
IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MIGUEL AYALA-VELIZ,

Defendant.

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:

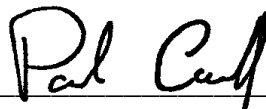
1:05 CR 125 PGC

ORDER TO AMEND INDICTMENT
TO REFLECT TRUE NAME OF
DEFENDANT

Upon the motion of the United States of America, and good cause appearing therefor, it hereby is ORDERED that the caption and Count 1 of the Indictment in Docket # 1:05 CR 125 PGC be amended by interlineation to replace MIGUEL AYALA-VELIZ with the true and correct name of RAFAEL VASQUEZ ESPINOZA a.k.a. MIGUEL AYALA-VELIZ.

It is FURTHER ORDERED that the record of the case and all future notices and pleadings reflect the true name of the defendant referenced herein.

DATED this 7th day of September, 2006.



PAUL G. CASSELL
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

FILED
U.S. DISTRICT COURT
2006 SEP -1 P 3:55

UNITED STATES OF AMERICA

Plaintiff,

MIKEL JEPSEN

Defendant

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:
:
:

ORDER TO MODIFY
CONDITIONS OF RELEASE
1:06-CR-021-001 DB

DISTRICT OF UTAH

DEPUTY CLERK

It is hereby ordered that the following condition be removed:

1. Defendant is to reside at the halfway house.

All other conditions of pretrial release are to remain the same.

DATED this 5th day of Sept, 2006.

BY THE COURT:



Honorable Samuel Alba
Chief United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

2006 SEP -7 P 3:57

BRUCE W. CONLEY,)
)
 Plaintiff,) Case No.)
)
 v.)
)
 WEBER COUNTY SHERIFF et al.,) **O R D E R**
)
 Defendants.)

Plaintiff, Bruce W. Conley, an inmate in Weber County, has filed a *pro se* civil rights complaint.¹ The filing fee is \$350.² However, Plaintiff asserts he is unable to prepay the filing fee. He thus applies to proceed without prepaying the filing fee and submits a supporting affidavit.³

The Court grants Plaintiff's request to proceed without prepaying the entire filing fee. Even so, Plaintiff must eventually pay the full \$350.00.⁴ Plaintiff must start by paying "an initial partial filing fee of 20 percent of the greater of . . . the average monthly deposits to [his prison] account . . . or . . . the average monthly balance in [his prison] account for the 6-month period immediately preceding the filing of the complaint."⁵ Under this formula, Plaintiff must pay \$1.22. If

¹See 42 U.S.C.S. § 1983 (2006).

²See 28 *id.* § 1914(a).

³See *id.* § 1915(a).

⁴See *id.* § 1915(b)(1).

⁵*Id.*

Judge Bruce S. Jenkins
DECK TYPE: Civil
DATE STAMP: 09/07/2006 @ 16:32:25
CASE NUMBER: 1:06CV00104 BSJ

this initial partial fee is not paid within thirty days, or if Plaintiff has not shown he has no way to pay it, the complaint will be dismissed.

Plaintiff must also complete the attached "Consent to Collection of Fees" form and submit the original to the inmate funds accounting office and a copy to the Court within thirty days so the Court may collect the balance of the filing fee. Plaintiff is notified that, based on Plaintiff's consent form submitted to this Court, Plaintiff's correctional institution will make monthly payments from Plaintiff's inmate account of twenty percent of the preceding month's income credited to Plaintiff's account.

IT IS THEREFORE ORDERED that:

(1) Plaintiff may proceed without prepaying his filing fee; however, he must eventually pay the full filing fee of \$350.00.

(2) Plaintiff must pay an initial partial filing fee of \$1.22 within thirty days, or his complaint will be dismissed.

(3) Plaintiff must make monthly payments of twenty percent of the preceding month's income credited to Plaintiff's account.

(4) Plaintiff shall make the necessary arrangement to give a copy of this Order to the inmate funds accounting office or other appropriate office at Plaintiff's correctional facility.

(5) Plaintiff shall complete the consent to collection of fees and submit it to his correctional institution's inmate funds accounting office and also submit a copy of the signed consent to this Court within thirty days from the date of this Order or the complaint will be dismissed.

DATED this 6th day of September, 2006.

BY THE COURT:


PAUL M. WARNER
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

CONSENT TO COLLECTION OF FEES FROM INMATE TRUST ACCOUNT

I, Bruce Wayne Conley, understand that even though the Court has granted my application to proceed *in forma pauperis* and filed my complaint, I must still eventually pay the entire filing fee of \$350.00. I understand that I must pay the complete filing fee even if my complaint is later dismissed.

I, Bruce Wayne Conley, hereby consent for the appropriate institutional officials to withhold from my inmate account and pay to the court an initial payment of \$1.22, which is 20% of the greater of:

- (a) the average monthly deposits to my account for the six-month period immediately preceding the filing of my complaint or petition; or
- (b) the average monthly balance in my account for the six-month period immediately preceding the filing of my complaint or petition.

I further consent for the appropriate institutional officials to collect from my account on a continuing basis each month, an amount equal to 20% of each month's income. Each time the amount in the account reaches \$10, the Trust Officer shall forward the interim payment to the Clerk's Office, U.S. District Court for the District of Utah, 350 South Main, #150, Salt Lake City, UT 84101, until such time as the \$350.00 filing fee is paid in full.

By executing this document, I also authorize collection on a continuing basis of any additional fees, costs, and sanctions imposed by the District Court.

Signature of Inmate
Bruce Wayne Conley

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH FILED
U.S. DISTRICT COURT
CENTRAL DIVISION

2006 SEP -7 P 3:03

DISTRICT OF UTAH

COVERSTAR, INC., A Utah corporation,)

Case No. 2:01cv663 DSY: _____
DEPUTY CLERK

Plaintiff,)

vs.)

ORDER ADDRESSING
COVERSTAR'S RULE 59
MOTION

COOLEY, INC., a Rhode Island)

corporation; and COOLEY ENGINEERED)

MEMBRANES, INC., a Rhode Island)

corporation,)

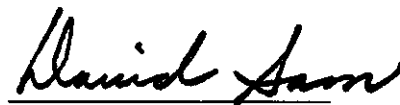
Defendant.)

The court hereby grants Coverstar's Motion for Leave to File Response to "Pursuant to Court's Request Defendant's Supplemental Brief Re: Coverstar's Rule 59 Motion." Coverstar has until September 13, 2006 to respond to Cooley's Supplemental Memorandum.

SO ORDERED.

DATED this 5th day of September, 2006.

BY THE COURT:



DAVID SAM
SENIOR JUDGE
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

MACHELL PHIBBS et al.,

Plaintiffs,

vs.

**AMERICAN PROPERTY
MANAGEMENT et al.,**

Defendants.

**ORDER GRANTING MOTIONS FOR
EXTENSION OF TIME**

Case No. 2:02CV260

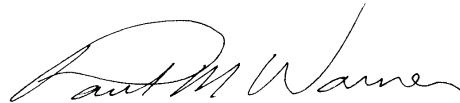
Judge Dee Benson

Magistrate Paul M. Warner

This matter is before the court on Plaintiffs' (1) Motion for an Extension of Time to submit expert witness signatures [docket no. 91] and (2) Motion for Extension of Time to file an opposition [docket no. 93] to Defendants' Motion in Limine. For good cause appearing, Plaintiffs' motions are GRANTED, and it is ORDERED that Plaintiffs have until and including October 5, 2006 to submit expert witness signatures and to file an opposition memorandum.

DATED this 8th day of September, 2006.

BY THE COURT:



PAUL M. WARNER

United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

MACHELL PHIBBS et al.,

Plaintiffs,

vs.

**AMERICAN PROPERTY
MANAGEMENT et al.,**

Defendants.

ORDER

Case No. 2:02CV260

Judge Dee Benson

Magistrate Paul M. Warner

This matter was referred to Magistrate Judge Paul M. Warner by District Judge Dee Benson pursuant to 28 U.S.C. § 636(b)(1)(A). Before the court is pro se Plaintiffs Machell Phibbs and Nicolina Phibbs’s (“Plaintiffs”) Motion for Extension of Time¹ to complete discovery [docket no. 75] and Motion for Contempt of Court² [docket no. 67]. The court has carefully reviewed the memoranda submitted by the parties. Pursuant to Utah local rule 7-1(f), the court elects to determine the motion on the basis of the written memoranda and finds that oral argument would not be helpful or necessary. *See* DUCivR 7-1(f).

(1) Plaintiffs’ Motion for Extension of Time to Complete Discovery

Plaintiffs seek to reopen fact discovery and extend the discovery deadline to October 1,

¹Plaintiffs’ motion is styled as a “Motion for Extension of Time Out of Time.”

²Plaintiffs’ motion is styled as a “Motion and Oder [sic] for Contempt of Court and Misconducted [sic] By Defendants and Counsel.”

2006³ on the grounds that (1) the dates on the Scheduling Order were different from the dates Plaintiffs agreed to in the Attorneys' Planning Meeting Report ("Report") and (2) Plaintiffs never received the Scheduling Order from the court.⁴

On November 21, 2005, the parties filed the Report, and based upon the dates that the parties agreed to in the Report, this court issued a Scheduling Order on November 30, 2005. While all of the dates are the same, the layout of the discovery sections of the Report and the Scheduling Order differ slightly. Specifically, the Report indicates the following:

- b. All discovery will be completed no later than May 4, 2006.
 - (i) All fact discovery is to be completed on or before April 17, 2006.
 - (ii) Expert discovery is to be completed on or before May 4, 2006.

And the Scheduling Order states the following:

- a. Discovery to be completed by:

Fact discovery	<u>4/17/2006</u>
Expert discovery	<u>5/4/2006</u>

The Scheduling Order permitted a maximum of 25 interrogatories, 20 requests for admissions, and 45 requests for production of documents by any party to any party. On October

³Plaintiffs requested an extension until September 31, 2006. Because that date does not exist, the court interprets it as a request to extend the deadline to October 1, 2006.

⁴The docket demonstrates that the Scheduling Order was, in fact, mailed to Plaintiffs on December 1, 2005 [docket no. 42]. However, even assuming Plaintiffs never received the Scheduling Order, the dates on the Report to which Plaintiffs agreed are the same as those dates in the Scheduling Order. Accordingly, the court is not persuaded to extend the fact discovery deadline on this ground.

Plaintiffs also assert that they had an informal verbal agreement with Defendants' counsel to extend discovery past the deadline. The correspondence between Plaintiffs and Defendants' counsel does not reflect this, and thus, the court is not persuaded to extend the fact discovery deadline on this ground either.

17, 2005, Plaintiffs served an initial set of interrogatories and requests for production of documents on Defendants. This included 23 requests for production, 64 interrogatories, and 43 requests for admissions. Pursuant to stipulation of the parties, Defendants served answers and responses on December 15, 2005, and the signature page for the interrogatory answers was served on February 24, 2006.

Plaintiffs served their most recent discovery requests on April 27, 2006—ten days after the cutoff date for fact discovery, but seven days prior to the expert discovery cutoff date. They included an additional 48 interrogatories, an additional 17 requests for production, and an additional 37 requests for admissions. While Defendants objected to the 37 additional requests for admissions, they have nonetheless responded to the requests. Defendants, however, did not respond to the 48 additional interrogatories or the 17 additional requests for production of documents.

Plaintiffs argue that because the Report states that “[a]ll discovery will be completed no later than May 4, 2006,” and Plaintiffs served the discovery requests at issue on April 27, 2006, Defendants should be ordered to answer the pending interrogatories and requests for production of documents. Plaintiffs also seek a modification of the Scheduling Order to extend the discovery deadline until October 1, 2006.

The Scheduling Order required the parties to complete fact discovery by April 17, 2006, and as such, all fact discovery requests should have been served by March 15, 2006, at the latest in order to complete discovery by April 17, 2006, as required by the Scheduling Order. *See* Fed. R. Civ. P. 33(b)(3), 34(b), 36(a) (stating that the party upon whom the discovery request has been served shall answer or reply within thirty days after service unless a shorter or longer time is agreed upon by the parties or ordered by the court). Accordingly, Plaintiffs’ most recent

discovery requests served on April 27, 2006, were over a month late. But even assuming that it was permissible for Plaintiff to serve discovery requests upon Defendants until the fact discovery deadline, Plaintiffs were still ten days past that date. Also, even if the May 4, 2006 expert discovery deadline was actually the fact discovery deadline, as was allegedly understood by Plaintiffs, the discovery requests should have been served by April 4, 2006 in order to complete discovery by May 4, 2006.

Defendants contend that the court should deny Plaintiffs' motion because regardless of whether the discovery cutoff was the fact discovery deadline of April 17, 2006 or the expert discovery deadline of May 4, 2006, Plaintiffs served their discovery requests too late. While the court agrees that Plaintiffs should have served their discovery requests thirty days prior to the April 17, 2006, fact discovery cutoff, upon considering Plaintiffs' status as pro se litigants, the court GRANTS IN PART and DENIES IN PART Plaintiffs' motion. Accordingly, IT IS HEREBY ORDERED AS FOLLOWS:

(A) Defendants are ORDERED to answer the additional 17 requests for production of documents because Plaintiffs have not yet reached their limit set by the Scheduling Order. But because the trial is fast approaching, the court orders Defendants to complete this document production within 20 days of the date of this order.

(B) Because Plaintiffs have exceeded their maximum number of interrogatories in their first discovery request, the court DENIES Plaintiffs' motion as to the additional 48 interrogatories. Accordingly, Defendant is not required to answer these.

(C) Because Defendants have already answered the 37 additional requests for admission, the court will allow these answers to remain at this time.

(D) The court further DENIES Plaintiffs' motion to extend the fact discovery deadline

to October 1, 2006. Accordingly, no further discovery (aside from what has been ordered here) will be permitted in this matter.

(2) Plaintiff's Motion for Contempt of Court

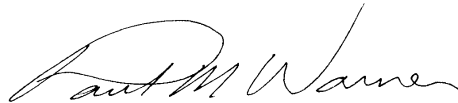
Plaintiffs ask the court to find Defendants in contempt of court on the grounds that Defendants have failed to produce timely answers to interrogatories on several occasions and that Defendants have "lied" or omitted information in the interrogatories they have answered. Defendants dispute Plaintiffs' allegations. It appears that the parties stipulated to extensions of time regarding the interrogatories. Whether or not Defendants have "lied" on their answers to interrogatories is not for the court to decide at this stage of the case nor is it an appropriate basis for finding Defendants in contempt. For these reasons, Plaintiff's Motion for Contempt of Court is DENIED.

(3) Other requests

Both parties have made other requests of the court (e.g., to strike witnesses and to strike requests for admissions and answers) in their various filings. These requests, however, were not official motions to the court and as such the court will not entertain them.

DATED this 8th day of September, 2006.

BY THE COURT:

A handwritten signature in cursive script, appearing to read "Paul M. Warner", is written over a horizontal line.

PAUL M. WARNER
United States Magistrate Judge

FILED
U.S. DISTRICT COURT

2006 SEP -7 P 4:00

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

THE SCO GROUP, INC.

Plaintiff/Counterclaim-Defendant,

v.

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

Defendant/Counterclaim-Plaintiff.

**[PROPOSED] ORDER GRANTING EX
PARTE MOTION FOR LEAVE
TO FILE OVERLENGTH REPLY
MEMORANDUM IN SUPPORT OF
SCO'S OBJECTIONS TO
MAGISTRATE JUDGE WELLS'
ORDER OF JUNE 28, 2006**

Case No. 2:03CV0294DAK

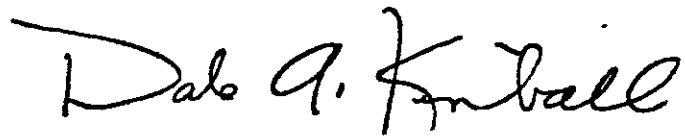
Honorable Dale A. Kimball
Magistrate Judge Brooke C. Wells

This matter comes before the Court on the Ex Parte Motion of Plaintiff/Counterclaim-
Defendant The SCO Group ("SCO") for Leave to File Overlength Reply Memorandum in

Support of SCO's Objections to Magistrate Judge Wells' Order of June 28, 2006. The Court, having considered the matter, hereby determines that good cause and exceptional circumstances exist and here ORDERS that SCO be granted leave to file its Overlength Reply Memorandum consisting of 50 pages, exclusive of face sheet, table of contents and authorities, appendixes and exhibits.

DATED: September 7, 2006.

BY THE COURT:

A handwritten signature in black ink that reads "Dale A. Kimball". The signature is written in a cursive, flowing style. The first name "Dale" is written with a large, sweeping capital 'D'. The middle initial "A." is written in a smaller, more compact cursive. The last name "Kimball" is written with a large, sweeping capital 'K' and continues with the rest of the name in a cursive script.

Honorable Dale A. Kimball

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of September, 2006, I caused to be served a true and correct copy of the foregoing [PROPOSED] ORDER GRANTING EX PARTE MOTION FOR LEAVE TO FILE OVERLENGTH REPLY MEMORANDUM IN SUPPORT OF SCO'S OBJECTIONS TO MAGISTRATE JUDGE WELLS' ORDER OF JUNE 28, 2006 by CM/ECF or U.S. Mail, postage prepaid, to the following:

David Marriott, Esq.
Cravath, Swaine & Moore LLP
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019

Todd Shaughnessy, Esq.
Snell & Wilmer LLP
1200 Gateway Tower West
15 West South Temple
Salt Lake City, Utah 84101-1004

Donald J. Rosenberg, Esq.
1133 Westchester Avenue
White Plains, New York 10604

/s/ Brent O. Hatch _____

UNITED STATES DISTRICT COURT

CENTRAL DIVISION

District of

UTAH

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

V.

RICHARD A. LARSON

Case Number: DUTX 204CR000634

USM Number: 12856-082

Mark Gregersen

Defendant's Attorney

FILED
U.S. DISTRICT COURT

2006 SEP -8 A 11:38

DISTRICT OF UTAH

DEPUTY CLERK

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 of the Indictment

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §841(b)(1)(B)	Possession with Intent to Distribute Five Grams or More of Actual Methamphetamine.		1

The defendant is sentenced as provided in pages 2 through 10 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

8/16/2006

Date of Imposition of Judgment

Signature of Judge

Ted Stewart

Name of Judge

United States District

Title of Judge

8/21/2006

Date

DEFENDANT: RICHARD A. LARSON
CASE NUMBER: DUTX 204CR000634

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

87 months

☒ The court makes the following recommendations to the Bureau of Prisons:

1. Incarceration, in order of preference, at Herlong, CA; Stafford, AZ; or, Englewood, CO.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☒ before 2 p.m. on 9/18/2006

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: RICHARD A. LARSON
CASE NUMBER: DUTX 204CR000634

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

48 months

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: RICHARD A. LARSON
CASE NUMBER: DUTX 204CR000634

ADDITIONAL SUPERVISED RELEASE TERMS

- 1) The defendant will submit to drug/alcohol testing as directed by the probation office, and pay a one-time \$115 fee to partially defer the costs of collection and testing. If testing reveals illegal drug use or excessive and/or illegal consumption of alcohol such as alcohol-related criminal or traffic offenses, the defendant shall participate in drug and/or alcohol abuse treatment under a copayment plan as directed by the United States Probation Office and shall not possess or consume alcohol during the course of treatment, nor frequent businesses where alcohol is the chief item of order.
- 2) The defendant shall submit his person, residence, office, or vehicle to a search, conducted by the United States Probation Office at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

CRIMINAL MONETARY PENALTIES

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: RICHARD A. LARSON
CASE NUMBER: DUTX 204CR000634

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A ☒ Lump sum payment of \$ 100.00 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- ☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

FILED
U.S. DISTRICT COURT

2006 SEP -8 P 3:09

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

DISTRICT OF UTAH

BY: _____
DEPUTY CLERK

CENTRAL DIVISION

UNITED STATES OF AMERICA,

:

Plaintiff,

:

ORDER

vs.

:

DANNY ALVAREZ,

:

Case No. 2:05-CR-635 TC

Defendant.

:

This matter came before the court for a status conference on the 8th day of September, 2006. The defendant had a trial date of August 30, 2006, which the court continued. For good cause shown, no new trial date will be set until after the October 20, 2006 status conference due to the health of the defendant and ongoing plea negotiations. The court finds that the best interest of the public and the defendant in a speedy trial dictate the continuance, and therefore this time shall be excluded from the time allowed for trial under the Speedy Trial Act, 18 U.S.C. § 3161.

DATED this 8th day of September, 2006.

BY THE COURT:

Tena Campbell

TENA CAMPBELL

United States District Judge

RONALD J. YENGICH (#3580)
YENGICH, RICH & XAIZ
Attorneys for Defendant
175 East 400 South, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 355-0320

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,)	
)	
)	ORDER TO
Plaintiff,)	RETURN PROPERTY
)	
v.)	
)	Case No. 2:05 CR 911
BRANDON L. RUSHTON,)	
)	Honorable Paul Cassell
Defendant.)	

Based upon the motion and stipulation of counsel and for good cause shown;

IT IS HEREBY ORDERED that hereby ordered that the return of property is to be returned to their rightful owners upon proof of identification and ownership of the following weapons:

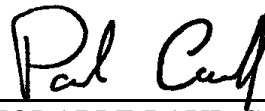
Todd Lecheminant	.44 Magnum firearm
Lon Anderson	9mm firearm
Destin Schwartz	9mm firearm

IT IS FURTHER ORDERED that Alcohol, Tobacco and Firearms, through their authorized representative are ordered to release the firearms to the above named individuals.

IT IS FURTHER ORDERED that the release of the firearms in no way can be used by the defendant to compromise the sentencing in the above-entitled case.

SIGNED this 7th day of September, 2006.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Paul Casell", written over a horizontal line.

HONORABLE PAUL CASSELL
United States District Court Judge

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

EDWARD MURRELL, an individual, Plaintiff, vs. COOPER TIRE & RUBBER CORP., a Delaware corp., Defendant.	ORDER TO SHOW CAUSE Case No. 2:05-CV-252 TS
---	--


Plaintiff moves for an order holding Lisa Pasbjerg in Contempt for the failure to comply with the Court's Order Granting Motion to Compel Return of Confidential Documents. Good cause appearing, it is therefore

ORDERED that by September 18, 2006, Lisa Pasbjerg shall file a response stating why she should not be held in contempt of court for the failure to comply with the Court's Order Granting Motion to Compel Return of Confidential Documents. It is further

ORDERED that the clerk of court shall transmit a copy of this order to the alleged contemnor certified mail, return receipt requested, at the addresses listed on the Certificate of Service, Docket No. 50.

DATED September 8, 2006.

BY THE COURT:



TED STEWART
United States District Judge

United States District Court
for the
District of Utah
September 8, 2006

*****MAILING CERTIFICATE OF THE CLERK*****

RE: Murrell v. Cooper Tire & Rubber
2:05-cv-252-TS

I HEREBY CERTIFY THAT THE "ORDER TO SHOW CAUSE" ISSUED ON 9/8/06 WAS
MAILED VIA CERTIFIED MAIL/RETURN RECEIPT REQUESTED TO THE FOLLOWING
ON 9/8/06:

Lisa M. Pasbjerg
7670 SE 110TH ST RD
BELLEVIEW, FL 34420

Lisa M. Pasbjerg
14118 SE 44TH COURT
SUMMERFIELD, FL 34491

Lisa M. Pasbjerg
PO BOX 96
BELLEVIEW, FL 34421

By: s/ Bonnie King, Deputy Clerk on 9/8/06

Bonnie King, Deputy Clerk

FILED
U.S. DISTRICT COURT

2006 SEP -8 P 3:09

DISTRICT OF UTAH

BY: _____
DEPUTY CLERK

RECEIVED

SEP 08 2006

OFFICE OF
JUDGE TENA CAMPBELL

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,

CASE NO: 2:06 CR 37

Plaintiff,

vs.

ORDER TO CONTINUE TRIAL
AND TO EXCLUDE TIME

AMBER TEMPEST YOUNG,

Judge Tena Campbell

Defendant.

On the motion of the United States, and good cause appearing, the Court issues the following Order.

The trial in this matter, which was previously scheduled for April 10, 2006, is continued to November 15, 2006. In addition, the Court excludes from Speedy Trial Act computation all time from March 22, 2006, through November 15, 2006 in light of the pretrial motion filed by Defendant on March 22, 2006, which the Court resolved in the

government's favor on August 28, 2006. *See* 18 U.S.C. § 3161(h)(1)(F).

IT IS SO ORDERED.

DATED this 8 day of September, 2006.

BY THE COURT:

A handwritten signature in black ink, reading "Tena Campbell", written over a horizontal line.

Judge Tena Campbell
United States District Judge

**United States District Court
for the District of Utah**

Petition and Order for Summons for Offender Under Supervision

Name of Offender: **CINDY Y. RODRIGUEZ**Docket Number: **2:06-CR-00310-001-DON**Name of Sentencing Judicial Officer: **Honorable David O. Nuffer, United States Magistrate Judge**Date of Original Sentence: **May 25, 2006**Original Offense: **Simple Possession of a Controlled Substance**Original Sentence: **12 months probation under 18 U.S.C. 3607**Type of Supervision: **Probation**Supervision Began: **May 25, 2006**

FILED

U.S. DISTRICT COURT

2006 AUG 24 AM 11:30

DISTRICT OF UTAH

BY: DEPUTY CLERK

PETITIONING THE COURT

☒ To issue a summons

7153 W. Crow Circle, West Valley City, UT 84128

CAUSE

The probation officer believes that the offender has violated the conditions of supervision as follows:

Allegation No. 1: On May 25, 2006, the defendant submitted a urine sample that tested positive for marijuana.

Allegation No. 2: The defendant has failed to submit to random urinalysis testing as directed on July, 26, 2006; July 31, 2006; August 9, 2006; August 14, 2006; and August 17, 2006.

Allegation No. 3: The defendant failed to submit Monthly Supervision Reports (MSRs) for the months of May, June, and July 2006, as directed.

Allegation No. 4: The defendant failed to contact the probation officer on August 3, 2006; and August 10, 2006, as directed.

I declare under penalty of perjury that the foregoing is true and correct


Maria EA Sanchez, U.S. Probation Officer

Date: August 21, 2006 

THE COURT ORDERS:

- ☒ The issuance of a summons
☐ The issuance of a warrant
☐ No action
☐ Other


Honorable David O. Nuffer
United States Magistrate Judge

Date: 8/25/06

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

MATTHEW COLTT MCKEAN,

Defendant.

**ORDER TO CONTINUE MOTION CUT-
OFF DATE**

Case No.2:06CR387 TS

Based upon the motion of the Defendant, Matthew Coltt McKean, by and through his attorney of record, L. Clark Donaldson, and the stipulation of the United States, represented by Dave Backman, the Court hereby continues the motion cut-off date currently set for September 6, 2006 is continued to the 20th day of September, 2006,

Dated this 8th day of September, 2006.

BY THE COURT:



HONORABLE TED STEWART
United States District Court Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

UNITED STATES OF AMERICA**Plaintiff,****Jody Kavalauskas****Defendant****Docket No.: 2:06-CR-00452-003 TC**

CONSENT TO MODIFY CONDITIONS OF RELEASE

I, **Jody Kavalauskas**, have discussed with Pretrial Services Officer Jerry Hawk, modification of my release conditions as follows:

Add: Submit to drug testing as directed by the pretrial office. If testing reveals illegal drug use, the defendant shall participate in substance abuse treatment, if deemed advisable by supervising officer.

All other previous Court imposed conditions to remain in effect.

I consent to this modification of my release conditions and agree to abide by this modification.

Jody Kavalauskas
Defendant

Aug 28 2006
Date

Jerry Hawk (JERRY HAWK)
Pretrial Services Officer

9-5-06
Date

I have reviewed the conditions with my client and concur that this modification is appropriate.

[Signature]
Defense Counsel

9-5-06
Date

ORDER OF THE COURT

- ☒ The above modification of conditions of release is ordered, to be effective on 8 September, 2006.
- ☐ The above modification of conditions of release is not ordered.

Paul M. Warner
Honorable Paul M. Warner

United States Magistrate Judge

8 Sept 2006
Date

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

FILED
U.S. DISTRICT COURT
2006 SEP -7 P 3:54

DISTRICT OF UTAH

UNITED STATES OF AMERICA,

:

BY: _____
DEPUTY CLERK

Plaintiff,

:

2:06 CR 460 TC

vs.

:

DANIEL CHHOUN,

:

O R D E R

aka "Little Man";

PRUM MONY TY,

:

aka "OG Johnny", "Krazy";

WILLIAM MATHIPANNHA,

:

aka "Lah", "D-Bo";

CHANTHA CHHAT,

:

aka "Chantha Chhak", "Tha",

"Dopey";

:

PHOUKHAM CHANTHAVONG,

:

aka "Kham", "Wonder",

"Gold", "Mark";

:

SAMNANG YONG,

:

aka "G-Monk", "Monkey Sam"

ANDREW SCHMIDT;

:

BRYAN CHHOUN;

:

ALAN RATRISOUK;

:

SACKDA DOUANGBUPHA,

:

aka "Chinaman"; "D-Crop";

:

VONGMANY MATHIPANNHA;

:

aka "Ket";

:

RY KEN; and

NIUE FAKATOU;

:

Defendants.

The above-named matter came before the court, Magistrate Samuel Alba, for status conference. The government was represented by Assistant United States Attorney Leshia M. Lee-Dixon; defendants were not present but were represented by counsel, except for Michael Jaenish, Scott Williams, and Robin

Ljunberg, who had other defense counsel present for them.

After being informed by the government that additional discovery, consisting of photographs, search warrants, photo-lineups, interviews - both audio and transcribed, and other related documentation will be forwarded to defense counsel today. There will be additional documents disclosed to defense counsel within the next three weeks.

The court finds that based upon the additional discovery documents, and the need for defense counsel to adequately review them in order to determine which motions, if any, need to be filed, the complexity of the case, and an additional date to determine which motions will be filed, a further hearing will be necessary to set additional hearings and an appropriate trial date.

Further status conference will be held on December 4, 2006 at 10:00 a.m, at which time the court should be advised on which motions will be filed.

In addition, the court finds the ends of justice served by setting the status conference date to determine further motion scheduling dates and an appropriate date for trial outweigh the best interests of the public and the defendant in a speedy trial based on the following:

1. Discovery is voluminous;
2. The case is complex in nature;

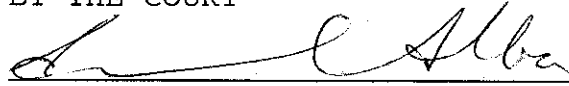
3. Further motion scheduling dates need to be determined;
and

4. Setting further motion hearing dates and a trial date without counsel having benefit to evaluate all discovery would deny counsel for the defendant reasonable time for preparation and continuity of counsel, taking into account the exercise of due diligence.

The Court HEREBY ORDERS pursuant to 18 U.S.C. § 3161(h)(8)(A), (B)(ii), that all time from August 28, 2006 to the date of December 4, 2006, be excluded from computation of time under the Speedy Trial Act.

DATED this 5th day of Sept, 2006.

BY THE COURT



SAMUEL ALBA, MAGISTRATE JUDGE
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

RECEIVED CLERK
AUG 24 2006
U.S. DISTRICT COURT

2006 SEP -1 P 2:46

UNITED STATES OF AMERICA,
Plaintiff,

v.

JAREN A. STUBBLEFIELD,
Defendant.

ORDER GRANTING LEAVE TO DISMISS
MISDEMEANOR INFORMATION

BY: DEPUTY CLERK
Case No. 2:06-CR-481

: Operating Off Highway Vehicle
in Violation of State Law (43
: C.F.R. 8341.1(d))

Magistrate Judge Brooke C.
Wells

Based upon the Motion of the United States of America, and for good cause appearing, the Court hereby grants the government leave to dismiss the above-captioned Misdemeanor Information, without prejudice, under Rule 48(a) of the Federal Rules of Criminal Procedure.

DATED this 1 day of Sept., 2006.

BY THE COURT:

Brooke C. Wells
United States Magistrate

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

**THEODORE L. HANSEN;
INTERSTATE ENERGY CORP.;
TRIPLE M, L.L.C.,**

Plaintiffs,

vs.

**NATIVE AMERICAN REFINERY
COMPANY aka NATIVE AMERICAN
REFINERY COMPANY, INC.; PT.
BANK NEGARA INDONESIA
(PERSERO) TBK; EKO
BUDIWIYONO; DRS. FIRMANSYAH;
GATOT SISMOYO; RACHMAT
WIRIATMAJA; YOPIE LAMONGE;
MAX NIODE; LILLES HANDAYANI;
UTTI KARIAYAM; MUBARIK AS
DJATIMUDA; STEVE O.Z. FINKEL-
MINKIN aka STEVE FINKEL;
ROBERT McKEE; FRED NEWCOMB;
NEWCOMB & COMPANY; AND DOES
1-20,**

Defendants.

ORDER

Case No. 2:06-cv-00109-PGC-PMW

Judge Paul G. Cassell

Magistrate Judge Paul M. Warner

This matter was referred to Magistrate Judge Paul M. Warner by District Judge Paul G. Cassell pursuant to 28 U.S.C. § 636(b)(1)(A). Before the court is the parties' stipulated motion for an extension of time for Defendants Fred Newcomb and Newcomb & Company to file their reply memorandum in support of their motion to dismiss for lack of jurisdiction.¹

¹ Docket no. 47.

Based upon the stipulation of the parties and good cause appearing therefor, the motion is GRANTED. Defendants Fred Newcomb and Newcomb & Company may have up to and including September 18, 2006, to file their reply memorandum in support of their motion to dismiss for lack of jurisdiction.

DATED this 8th day of September, 2006.

BY THE COURT:

A handwritten signature in cursive script, reading "Paul M. Warner", written in black ink.

PAUL M. WARNER
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

**UDK SOLUTIONS, INC. dba UTAH
DISASTER KLEENUP, a Utah
corporation; and DISASTER KLEENUP
INTERNATIONAL, INC., a Delaware
corporation,**

Plaintiffs,

vs.

**DISASTER CLEAN-UP SERVICE, LLC;
and MOST WANTED CARPET CARE,
LLC,**

Defendants.

STIPULATED PROTECTIVE ORDER

Case No. 2:06-cv-00192-TS-PMW

Judge Ted Stewart

Magistrate Judge Paul M. Warner

This matter was referred to Magistrate Judge Paul M. Warner by District Judge Ted Stewart pursuant to 28 U.S.C. § 636(b)(1)(A). Before the court is Plaintiffs' motion for entry of a stipulated protective order.¹

Upon motion by the parties for an order pursuant to Fed. R. Civ. P. 26(c), that trade secret or other confidential research, development or commercial information be disclosed only in a designated way;

IT IS HEREBY ORDERED:

¹ Docket no. 20.

1. Any party who, in this litigation, produces or discloses any document, thing or information in any form (which shall be referred to singularly or collectively as “protected information”) may designate such protected information as “CONFIDENTIAL” when it contains trade secrets, competitively sensitive information or other confidential information, the present disclosure of which would, in the good faith judgment of the party making the disclosure, be detrimental to that party. A person who is not a party to this lawsuit may designate as “CONFIDENTIAL” protected information provided to any party to this lawsuit. “Protected information” includes the information both as originally produced and in any other form, including copies, notes, and summaries of such information.

2. The designation of protected information as “CONFIDENTIAL” may be effected by visibly marking it “CONFIDENTIAL” or with words of similar import. The protected information may be so marked when it is produced, disclosed or at any time before copies ordered by the receiving party during a document examination are physically delivered to the receiving party or as otherwise provided in this Protective Order. Protected information may also be designated as “CONFIDENTIAL” in contemporaneous correspondence from the person that will produce or disclose the protected information to counsel for the parties to this action. The designation shall identify the documents by description or Bates number.

3. No protected information marked or designated as provided in this Protective Order may be used by any recipient of such information or disclosed to anyone for any purpose other than in connection with this litigation, and shall not be used for any business, commercial, or competitive purpose, or in any other litigation. No protected information may be disclosed by

the recipient of such information to anyone other than those persons designated below in paragraph 4, unless and until the restrictions in this Protective Order are removed either by agreement of the parties or by order of the Court.

4. All protected information designated as “CONFIDENTIAL” shall be restricted to the following persons:

- (a) Counsel who have appeared of record for any party in this case and partners, shareholders, associates, paralegal assistants, clerical staff and secretaries who are regularly employed by such counsel, and are actively engaged in assisting such counsel with respect to this litigation;
- (b) Each party to this litigation, including in-house counsel for any party in this case;
- (c) Any certified shorthand or court reporters retained to report a deponent’s testimony taken in this litigation;
- (d) Experts or any person retained or used by counsel for any party to assist counsel with respect to this litigation, who are not regular employees or consultants of such party;
- (e) Persons shown on the face of the document to have authored or received it;
- (f) Any person whom the parties agree, in advance and in writing, may receive such protected information; and
- (g) The Court and its personnel and an agreed-upon mediator and his or her staff.

This Protective Order does not prohibit a person from disclosing its own protected information.

Nor does this Protective Order prohibit a person from disclosing protected information independently obtained from non-confidential sources or sources that do not designate the information as confidential so long as the information was not improperly disclosed by the source of the information.

5. No person authorized under paragraphs 4(b), (d), or (f) of this Protective Order to receive access to protected information shall be granted such access until such person has received a copy of this Protective Order and agrees in writing to be bound by it by signing a copy of the agreement attached as Exhibit A to this Protective Order. The original of each such written agreement shall be maintained by counsel for the party that seeks to disclose protected information. Further, each recipient of protected information shall not make any copies of or notes concerning such information for any purpose whatsoever, except in connection with this litigation and solely for the purposes of this litigation.

6. Any person may designate as “ATTORNEYS’ EYES ONLY” information that it deems so competitively sensitive that it should not be learned by its competitors and/or another party to this litigation. Such information shall be disclosed only to persons described in paragraphs 4(a), 4(c), 4(d), 4(e), 4(f), and 4(g) above. Such information shall not be disclosed to a party or its agents, other than agents described in the preceding sentence. All other terms of this Protective Order apply equally to information designated as “CONFIDENTIAL” and information designated as “ATTORNEYS’ EYES ONLY.”

7. If, during the course of a deposition, hearing, or trial, counsel for any person designates any part of the testimony as “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY” the transcript shall be visibly marked on the cover page by the reporter as “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY.” Additionally, within 30 days after the date the testimony is given, counsel for any person may designate, by letter to all counsel and the reporter, any portion of the transcript as “CONFIDENTIAL” under the terms of this Protective Order, and a copy of

the letter shall be attached by the reporter and all counsel to the cover page of all transcripts. During this 30-day period, the entire transcript shall be treated as “ATTORNEYS’ EYES ONLY.” Any confidentiality under the terms of this Protective Order is waived as to any portion of the transcript which is not designated as “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY” within this 30-day period, unless otherwise agreed by the parties or ordered by the Court. Similarly, any party may produce documents for inspection without making confidentiality or privileged designations before permitting the inspection. The producing party, without waiving its right to assert confidentiality or privilege, may produce documents and things for inspection and make confidentiality and privilege designations for the first time when requested copies are being prepared. All documents and things so inspected shall be treated as ATTORNEYS EYES ONLY information between the time of inspection and receipt of the requested copies. This paragraph shall not be deemed or construed to authorize disclosure of any protected information to any person to whom disclosure is otherwise prohibited under this Protective Order.

8. A party may file a motion with the Court for an appropriate modification of this Protective Order, or an order that certain information is not entitled to be designated as “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY.” Such a motion shall identify the particular protected information proposed to be disclosed, the name and address of the person to whom the party proposes to disclose the protected information, and the reasons why such information should not be restricted. The party seeking disclosure of protected information may not disclose such information, or any part of it, pending the Court’s decision on the motion.

9. Any protected information designated under this Protective Order as “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY” which is filed with the Court for any purpose shall be filed in a sealed envelope or container marked on the outside with the title of the action, the identification of each document or other item within, and a statement substantially in the following form:

CONFIDENTIAL

Filed under seal pursuant to the Protective Order issued in this case on _____, 200_, which governs the confidentiality of documents and information. This envelope shall not be opened or the contents disclosed except in accordance with such Protective Order or by court order.

The Court, its staff, and counsel for the parties shall have access to any envelope or container submitted under seal in connection with this litigation. To the extent practicable, protected information shall be filed separately or in severable portions of filed papers, so that the non-confidential portions may freely be disseminated. No protected information shall be included in whole or in part in pleadings, motions, briefs, exhibits, memoranda or other papers filed in court, except as provided in this paragraph.

10. Any party receiving any protected information which has been designated as “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY” may object in writing to such designation. If such objection cannot be resolved by agreement, following settlement efforts under Federal Rule of Civil Procedure 37, the objecting party may file a motion with the Court for an appropriate modification of this Protective Order, or an order that certain information is not entitled to be designated as “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY.” Such

motion shall identify the particular protected information proposed to be disclosed, the name and address of the person to whom the party proposes to disclose the protected information, and the reasons why such information should not be restricted. The party seeking disclosure of such protected information may not disclose such information, or any part of it, pending the Court's decision on the motion. In all motions to modify a designation, the designating party shall bear the burden of justifying the particular designation made.

11. Counsel for each party shall take reasonable precautions to prevent the unauthorized or inadvertent disclosure of any protected information, and shall be responsible for insuring that each of his or her regularly employed partners, associates, paralegal assistants, clerical staff and secretaries who are assisting in this litigation and the proposed recipients of protected information are informed of the terms of this Protective Order and their obligations under it.

12. The production or disclosure of any protected information made after entry of this Protective Order which a party claims was inadvertent and should not have been produced or disclosed because of a privilege or work product protection will not be deemed to be a waiver of any privilege or protection. In the event of such claimed inadvertent production or disclosure, the following procedures shall be followed:

- (a) The party inadvertently producing or disclosing protected information may request the return of such material within twenty (20) days of discovering that it was inadvertently produced or disclosed. A request for the return of protected information shall identify the specific protected information, the basis for asserting that the specific protected information is subject to the attorney-client privilege or the work product doctrine, and the date of discovery that there had been an inadvertent production or disclosure.

(b) If a party requests the return, pursuant to this paragraph, of any such protected information from another party, the party to whom the request is made shall return immediately to the party requesting return all copies of the protected information within its possession, custody, or control, including all copies in the possession of experts, consultants, or others to whom the protected information was provided.

(c) If a party receiving documents disagrees with the party requesting return of the documents pursuant to this paragraph, the receiving party may, after returning the documents pursuant to paragraph 12(b), file a motion with the Court to compel production of the disputed documents.

13. This Protective Order shall not be deemed or construed as a waiver of any right to object to the furnishing of information in response to any discovery request. Nor shall this Protective Order be deemed or construed as a waiver of the attorney/client, work product, or any other privilege, or of the rights of any party, person or entity to oppose the production of any documents or information on any grounds. Further, nothing in this Protective Order shall be construed to limit, restrict or otherwise affect the ability of any party to seek the production of documents, testimony or information from any source.

14. This Protective Order shall not be deemed or construed in any way to affect or to establish the admissibility or to waive any right to object to the admissibility at trial of any protected information covered by this Protective Order.

15. Within 75 days after final termination of this action, including all appeals, any recipient of protected information under paragraphs 4(b)-(f) of this Protective Order, or outside experts and their regularly employed staff retained for this litigation who are not employees of or regular consultants to a party as referenced in paragraph 6 of this Protective Order, shall deliver

all protected information, including all copies thereof and all documents incorporating or referring to such information, to counsel for the person which disclosed the protected information to the recipient, unless the parties otherwise agree in writing. As an alternative, within the same 75-day period, all documents containing protected information may be destroyed and such destruction confirmed in correspondence to counsel for the disclosing person. A party and its counsel of record need not destroy or return protected information incorporated in materials filed with the court, subject to the terms of this Protective Order. Counsel of record need not destroy or return protected information incorporated in work product retained solely by counsel.

16. This Protective Order shall remain in full force and effect unless modified by an order of this Court or by the written stipulation of all parties hereto filed with the Court. Without limiting the generality of the foregoing, this Protective Order shall survive or remain in full force and effect after the termination of this litigation. Nothing in this Protective Order shall limit or preclude any party from applying to the Court for relief from this Protective Order, or for such further or additional protective orders as the Court may deem appropriate.


17. In the event that counsel for any party receives a demand or request to produce or disclose protected information or is informed that a demand or request for protected information has been made to any recipient of protected information under the terms of this Protective Order by any government agency or in connection with another lawsuit, counsel shall, within five business days after receipt of such demand or request or upon being informed of such demand or request, send to all counsel written notice of the identity of the person or entity making the demand or request and the recipient of the demand or request, the nature of the material

requested or demanded, and the date on which the protected information is to be produced or disclosed. The request or demand, be it in the form of subpoena, letter or otherwise, shall be attached to the letter.

18. This Protective Order is binding on the parties immediately upon its execution.

DATED this 8th day of September, 2006.

BY THE COURT:

A handwritten signature in cursive script, reading "Paul M. Warner", written in black ink.

PAUL M. WARNER
United States Magistrate Judge

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

UDK SOLUTIONS, INC. dba UTAH
DISASTER KLEENUP, a Utah Corporation,
and DISASTER KLEENUP
INTERNATIONAL, INC., a Delaware
Corporation

Plaintiffs,

vs.

DISASTER CLEAN UP SERVICE, LLC, and
MOST WANTED CARPET CARE LLC,

Defendants.

PROTECTIVE ORDER

Civil Action No. 2:06CV00192 TS

Judge Ted Stewart

Magistrate Judge Paul M. Warner

EXHIBIT A

The undersigned hereby acknowledges that he/she has read the protective order which was ordered by the court in the above-captioned case; that he/she is one of the persons contemplated in paragraph 4 and/or paragraph 6 thereof as being able to be given access to the information designated CONFIDENTIAL by one of the parties, that he/she fully understands and agrees to abide by the obligations and conditions thereunder, and that he/she subjects himself/herself personally to the jurisdiction of the District Court for District of Utah, or any other District Court to which the case may be transferred, for the purpose of proceedings relating to his/her performance under, compliance with, or violation of this Protective Order.

Dated: _____

Name: _____

Address: _____

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

NOVATIONS GROUP, INC., a Delaware corporation, THE TRAINING COMPANY, INC., a Utah corporation, and GARRETT GALLEY,

Plaintiffs,

vs.

ZENGER FOLKMAN COMPANY (fka EXTRAORDINARY PERFORMANCE GROUP, INC., fka THE EXTRAORDINARY LEADER), a Utah corporation, JOSEPH R. FOLKMAN, JOHN H. ZENGER, KURT SANDHOLTZ, KATHY BUCKNER (aka KATHY BUCKNER ROWE), LYNN NICHOLSON, KERRI WALKER (aka KERRI PRICE), and JOHN DOES 1-10,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS AND DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Case No. 2:06-CV-00347 PGC

On April 26, 2006, plaintiff Novations Group Inc. (NGI) and the other named plaintiffs filed its complaint alleging myriad claims against defendant Zenger Folkman Company (ZFC) and the other named defendants. On the same day, NGI moved for a preliminary and permanent

injunction against ZFC [#13]. ZFC has responded to these motions, also filing its own motion to dismiss various claims asserted by NGI's complaint [#31]. Given the following discussion, the court GRANTS IN PART AND DENIES IN PART ZFC's motion to dismiss [#31] and DENIES NGI's motion for preliminary and permanent injunction against ZFC [#13]. A complicated discussion ensues.

BACKGROUND

For the purposes of resolving NGI's preliminary and permanent injunction motions and ZFC's motion to dismiss, the court finds the following facts. NGI alleges that this "case is about defendants taking plaintiffs' intellectual property without authorization, and using it to compete against plaintiffs."¹

A. NGI and ZFC.

NGI, as "Novations," incorporated in Utah in 1986 and engages in the organization performance improvement industry. On May 4, 1998, NGI was acquired by and merged into Novations Acquisition Corporation, a wholly owned subsidiary of Provant, Inc. Novations Acquisition Corp. then changed its name to Novations Group, Inc., and "is the successor in interest to the earlier Novations Group, Inc."²

A number of the named defendants, Joseph Folkman, John Zenger, Kurt Sandholtz, Kathy Buckner and Kerri Price were officers, shareholders, employees, or contractors of NGI or its parent through various dates in 2002 and 2003. Mr. Folkman was one of the founding

¹ Complaint, Docket No. 1, at 4 (Apr. 24, 2006).

² *Id.* ¶ 12-13.

partners and shareholders of NGI, serving as an executive of NGI at all relevant times of the complaint. From 1998 through 1999, Mr. Zenger was president of Provant, Inc., and from 2000 through 2002, he was Executive Vice President of Provant, Inc. Then, from 2002 through October 2003, Mr. Zenger became president and CEO of Provant, Inc., before being vice chairman of NGI's board of directors from December 2002 to September 2003. Until October 31, 2003, Mr. Zenger was an employee of NGI. And from April 2002 to November 2002, Mr. Sandholtz was an employee of NGI, although he did take a sabbatical from May 2002 until termination from NGI in November 2002.

Until July 2003, the defendants allegedly operated their competing business as an "unregistered entity known as 'Extraordinary Leader,'" at which point they incorporated their entity as "Extraordinary Performance Group, Inc."³ Extraordinary Performance Group, Inc. then changed its name to Zenger Folkman Company.⁴ From July 2003, Mr. Folkman has been co-founder and president of Extraordinary Performance Group, Inc. (EXPGI), and then its successor ZFC. Mr. Zenger has also been co-founder and CEO of EXPGI, and then its successor ZFC. Mr. Sandholtz has served variously as principal, employee and consultant to EXPGI and then ZFC. From July 2003 until May 2005, Ms. Buckner has been a principal, employee and/or consultant to EXPGI and ZFC. And Ms. Price has worked for EXPGI and then ZFC since July 2003.

³ *Id.* ¶ 6, 53-54.

⁴ *Id.*

In 1998 and again in 2002, Joseph Folkman, John Zenger and Kurt Sandholtz entered into Executive Employment Agreements with NGI containing non-competition, confidentiality, and ownership of intellectual property provisions. Those agreements expressly prohibited Mr. Folkman, Mr. Zenger and Mr. Sandholtz from using or disclosing any of NGI's "Confidential Information" or "Proprietary Information" in connection with any other business or employment. NGI specifically alleges that the breach of certain provisions in those agreements, as well as breach of the common law duty of loyalty, are a serious component of its complaint.

These employment agreements contained a number of pertinent clauses. Mr. Zenger's 1998 Employment Agreement stated that he would "not engage or become interested, directly or indirectly, as an owner, employee, director, partner, consultant, . . . in the operation, management or supervision of any type of business or enterprise in any way similar or competitive with" Provant, Inc for five years from the effective date.⁵ Mr. Zenger also agreed that he would "not, directly or indirectly, use or disclose any Confidential Information."⁶ According to the 1998 Agreement, Mr. Zenger also "understands and agrees that this restriction will continue to apply after his employment terminates, regardless of the reason for termination."⁷ Mr. Zenger also agreed that "all Confidential Information which he creates or to which he has access as a result of his employment is and shall remain the sole and exclusive property of" Provant.⁸ As part of the

⁵ *Id.* ¶ 20-22 (Para. 7 of the 1998 Zenger Agreement).

⁶ *Id.* ¶ 22 (Para. 8(a) of the 1998 Zenger Agreement).

⁷ *Id.*

⁸ *Id.* ¶ 23 (Para. 8(b) of the 1998 Zenger Agreement).

Agreement, Mr. Zenger agreed not to copy or remove any documents or other media containing confidential information. Mr. Zenger further agreed “that he has carefully read and considered all of the terms and conditions of this Agreement, . . . [and] further acknowledges and agrees that, were he to breach any of the covenants contained in [Para. 7 or 8], the damages would be irreparable.”⁹ And Mr. Zenger finally agreed that Provant would be “entitled to preliminary and permanent injunctive relief against any breach of threatened breach . . . provided [Provant] has made a prima facie showing of such a breach of threatened breach.”¹⁰

Both Mr. Folkman and Mr. Sandholtz also entered into similar employment agreements in 1998. Their agreements included a statement agreeing that they “shall not engage in any other business activity or serve in any industry, trade, professional, governmental or academic position during the term of this Agreement, except as may be expressly approved in advance by the Board in writing or to the extent that such activity or service does not materially and adversely affect the discharge of his duties and responsibilities.”¹¹ These agreements also included an agreement not to compete,¹² an agreement not to disclose or use confidential information,¹³ and an agreement that NGI would be entitled to preliminary and permanent injunctive relief upon a prima facie

⁹ *Id.* ¶ 24 (Para. 9 of the 1998 Zenger Agreement).

¹⁰ *Id.*

¹¹ *Id.* ¶ 26-27 (Para. 3(c) of the 1998 Folkman/Sandholtz Agreements).

¹² Complaint, ¶ 28; *see supra* note 5.

¹³ Complaint, ¶ 30-31; *see supra* notes 6-7.

showing of a breach or threatened breach.¹⁴

Given that the 1998 employment agreements were soon to expire, Messrs. Zenger, Folkman and Sandholtz each signed letter agreements converting their employment arrangements to at-will employment. These agreements stated that each person agreed “that your covenant not to compete and non-solicitation agreement with the Company . . . shall continue to be binding on you and are hereby extended to the later to occur of the current expiration date, May 4, 2003, or that date that is one year from the termination of your employment with the Company.”¹⁵ Additionally, according to the new employment agreements, “the confidentiality provisions contained in the [1998 Employment Agreement, Para. 8 were to] remain in effect during [Messrs. Zenger, Folkman and Sandholtz’s] continued employment by the Company and thereafter.”¹⁶ All of the 1998 Employment Agreements terminated on May 4, 2001. Mr. Folkman’s 2001 Employment Agreement terminated on June 30, 2003. Mr. Zenger’s 2001 Employment Agreement terminated on October 31, 2004. And Mr. Sandholtz’s 2001 Employment Agreement terminated on November 29, 2002. According to NGI’s assertions, “notwithstanding the expiration and termination of the respective 1998 and 2001 Agreements, Paragraphs 8,9, and 12 in the 1998 Agreements . . . as further defined and extended by their respective 2001 Agreements remain in full force and effect indefinitely.”¹⁷

¹⁴ Complaint, ¶ 32; *see supra* note 9-10.

¹⁵ Complaint, ¶ 44 (Para. 3 of the 2001 Employment Agreements).

¹⁶ *Id.*

¹⁷ *Id.* ¶ 46.

According to NGI, during, or close after their employment with NGI and Provant, several of the defendants allegedly “wrongfully and deceptively used . . . NGI’s confidential ‘360’ client survey data as the basis for their book *The Extraordinary Leader*. ”¹⁸ In 2002, while still employed by NGI, Messrs. Zenger, Folkman, and Sandholtz, and Ms. Buckner, allegedly “determined to develop ‘Extraordinary Leader’ products and services [in] competition with NGI” and conceal such competition from NGI.¹⁹ This included using more than 20 years of NGI’s confidential client survey data, and constituted confidential information according to the employment agreements. The ZFC defendants allegedly marketed and sold the Extraordinary Leader products and services to existing NGI and TTCI clients, as well as to new clients. The ZFC defendants also used NGI and TTCI software to process surveys and generate survey reported for these clients, invoicing these clients for products and services outside NGI. Such products and services allegedly used “NGI’s data, software, surveys, items and norms” and generated one million dollars in revenue to the defendants prior to the termination of their employment with NGI.²⁰

Relevant to this motion to dismiss and the preliminary and permanent injunction motion, NGI alleges the ZFC defendants engaged in numerous activities harming NGI. NGI and TTCI complain of copyright infringement, copyright act - works for hire violations, Lanham Act violations, cyberpiracy, breach of fiduciary duty, Uniform Trade Secrets Act (UTSA) violations,

¹⁸*Id.* ¶ 47.

¹⁹ *Id.* ¶ 49.

²⁰ *Id.* ¶ 52.

fraud, fraudulent concealment, unjust enrichment, conversion, tortious interference with existing and prospective economic relations, breach of contract, breach of duty of loyalty, confidentiality and noncompetition, unfair competition, conspiracy, breach of fiduciary duties of good faith and loyalty, and Racketeer-Influence and Corrupt Organizations Act²¹ (RICO) violations in its 86 page complaint.

B. TTCI, Garrett Galley and Lynn Nicholson

A further plaintiff, Garrett Galley and his company, The Training Company, Inc., also joined the complaint filed by NGI against the ZFC defendants. Mr. Galley worked as a computer programmer and developer and did business as The Training Company. From 1997 to 2002, NGI employed Mr. Galley as a computer programmer to develop a survey software system. In October 2001, Mr. Galley incorporated The Training Company, Inc. (TTCI). TTCI developed an employee survey and reporting system software program that included a web-based interface and the Internet domain names “performancesurveys.com” and “avasurveys.com.” TTCI’s software survey package included two types of surveys: a “360” survey about a single individual which that individual’s supervisor, peers and subordinates fill out; and an “Org” survey which is completed by everyone in a company and sorted based on the demographic information of the participants. TTCI employed defendant Lynn Nicholson who acted under TTCI’s direction to transact business as its agent. Among other duties, Mr. Nicholson put copyright notices on TTCI’s web-pages, while his certain duties included registering and managing TTCI’s domain names “performancesurveys.com” and “avasurveys.com.”

²¹ 18 U.S.C. § 1961 *et seq.*

TTCI offered its survey and reporting services to a number of companies, using its web-pages to offer these services. TTCI alleges that its “performancesurveys.com” web site contains TTCI’s copyright notices, and thereby has become a common law service mark for TTCI and its clients. On August 16, 2002, Mr. Nicholson registered the “performancesurveys.com” domain name for TTCI. On September 13, 2002, Mr. Nicholson registered “avasurveys.com” domain name for TTCI. When registering both of these domain names, Mr. Nicholson allegedly set the user name and authorization code for the domain names.

Mr. Folkman and Mr. Galley became acquainted with each other at NGI while both worked at that company. In 2002, TTCI provided services for Extraordinary Leader. Around June 23, 2003, Mr. Galley and Mr. Folkman reached an agreement regarding Mr. Galley’s employment at EXPGI. For a salary, Mr. Galley agreed to be the Chief Technology Officer of EXPGI and in charge of all technical aspects of the new company. Mr. Folkman and Mr. Galley discussed EXPGI’s possible purchase of TTCI’s survey software, but the parties never agreed to any purchase price or terms. Mr. Galley requested potential equity ownership of EXPGI, but Mr. Folkman declined to provide any such agreement.

Mr. Galley began working for EXPGI with responsibilities including fulfillment of feedback reports, customer/client support, desktop support, training new employees, network administration, installing and purchasing hardware and software, creating new survey collection processes, managing client projects, setting up new clients on the system, and computer programming. Mr. Galley allegedly worked “90 hours a week to fulfill these responsibilities.”²²

²² *Id.* ¶ 89.

TTCI also purchased numerous pieces of equipment and software for EXPGI, and EXPGI ultimately reimbursed TTCI for its purchases. On August 1, 2003, EXPGI also hired Mr. Nicholson and began paying him for his services. While employed by EXPGI, Mr. Galley and Mr. Nicholson also continued to provide services for TTCI clients as well.

In June 2003, Mr. Galley sold EXPGI the hardware that currently ran the performancesurveys.com software. That hardware remained in TTCI's offices until it was moved to EXPGI's offices in March 2004. After the hardware moved to EXPGI's offices, the server was pointed to EXPGI's web address. Mr. Galley alleges that TTCI never agreed to transfer the TTCI survey software to EXPGI, nor did he agree to any financial terms for its use, transfer or license. The complaint states that Mr. Galley "simply moved the hardware and changed the address to improve program performance, [Mr. Galley's] programming productivity, and other EXPGI employees' efficiency."²³

In February 2004, Mr. Folkman asked Mr. Galley to modify some code from NGI. Mr. Galley declined and Mr. Folkman hired an outside programmer for the request. In June 2004, EXPGI hired a Chief Operating Officer who "had different views about the direction of the technical aspect of the company and what programming languages and operating systems it should use."²⁴ On July 21, 2004, the COO called Mr. Galley to his office and informed him that EXPGI had hired a replacement Chief Technology Officer. On July 24, 2004, Mr. Galley resigned from EXPGI, and he gave EXPGI a two-week grace period during which to negotiate a

²³ *Id.* ¶ 100.

²⁴ *Id.* ¶ 101.

licensing agreement for EXPGI's continued use of TTCI's survey software. The parties did not reach an agreement, and Mr. Galley alleges that EXPGI (now ZFC) continues to possess and use TTCI's survey software without authorization while receiving substantial revenues from that use.

After his resignation, Mr. Galley also learned that Mr. Nicholson changed the user name and password to manage TTCI's "performancesurveys.com" and "avasurveys.com" websites and content. Both of these TTCI domain names are also currently listed as registered in Mr. Nicholson's name. Mr. Galley alleges that because of Mr. Nicholson's actions, he and TTCI do not have access to TTCI's copyrighted web sites and its copyrighted survey software. Mr. Galley alleges that although ZFC attempted to persuade him to return to its employ, it ceased to negotiate with him once it learned that Mr. Nicholson controlled and registered the TTCI domain names in his name. Mr. Galley further alleges that EXPGI continued to use TTCI's websites and survey software after TTCI terminated any right or implied license to use it. He also alleges that EXPGI blocked him and TTCI from accessing TTCI's websites. And he further alleges that EXPGI changed TTCI's website copyright notice from "© 2002 The Training Company" to "© 2004 Extraordinary Performance Group, Inc." and then to "© 2005 Zenger Folkman Company." Due to these copyright notices, Mr. Galley alleges that ZFC now claims it owns the copyrights to TTCI's websites and TTCI's survey software. Through continued unauthorized use of the survey software and servicing of TTCI's clients, Mr. Galley alleges that ZFC has grossed around \$3 million dollars.

Mr. Galley and TTCI specifically complain of copyright infringement, Lanham Act violations, cyberpiracy, UTSA violations, unjust enrichment, conversion, tortious interference

with existing and prospective economic relations, unfair competition, conspiracy, breach of fiduciary duties of good faith and loyalty, and RICO violations.

NGI and the other parties also move for a preliminary injunction [#13] and a permanent injunction [#13] at this time. NGI argues that it has met the requirements for the court to grant both of these motions, while ZFC counters that NGI has delaying filed these motions for a number of years. ZFC also argues that NGI's injunction motions are moot, and that NGI cannot show it is entitled to injunctive relief under the Federal Rules.

C. Motion to Dismiss

ZFC seeks to dismiss NGI's 3rd, 4th and 5th causes of action under the Copyright Act because the court lacks subject matter jurisdiction over the works asserted in those claims due to the fact that NGI has not federally registered these works and these claims are not otherwise actionable under the Copyright Act. ZFC seeks to dismiss NGI's 6th cause of action for "reverse passing off" under the Lanham Act because it conflicts with or is preempted by the Copyright Act. ZFC seeks to dismiss NGI's 14th through 16th causes of action for fraud because they are based on the acquisition of confidential information by alleged misrepresentations and therefore preempted by the Uniform Trade Secrets Act (UTSA). ZFC seeks to dismiss NGI's 19th through 21st causes of action for unjust enrichment because they are preempted by the Copyright Act, and/or the UTSA, and barred by NGI's legal remedies. ZFC seeks to dismiss NGI's 22nd cause of action in its entirety, and the 29th cause of action in part, for conversion of intangible property, including domain names, software and confidential data, because these claims are preempted by the Copyright Act, and/or the UTSA, and fail to state a claim for relief under Utah state law.

ZFC seeks to dismiss NGI's 23rd and 28th causes of action for tortious interference with existing and prospective economic relations because these claims fail in whole or in part to state a claim under Utah state law because NGI has alleged no recognized "improper purpose" and many of the alleged "improper means" are preempted by the Copyright Act and/or the UTSA. ZFC seeks to dismiss NGI's 26th and 34th causes of action for breach of fiduciary duty of confidentiality based on the alleged misappropriation of confidential information because they are preempted by the UTSA. ZFC seeks to dismiss NGI's 30th and 31st causes of action for unfair competition because they are preempted in part to the extent they rely on alleged underlying misconduct preempted by the Copyright Act, and/or the UTSA and fail to state claims under Utah state law. ZFC seeks to dismiss NGI's 32nd and 33rd causes of action for conspiracy because they are preempted in part by the Copyright Act, and/or the UTSA, to the extent they rely on underlying torts that are preempted by those Acts, and because NGI has not alleged these claims with sufficient particularity. Finally, ZFC seeks to dismiss NGI's 35th cause of action under RICO because NGI has failed to allege the required investment or acquisition injury under §§ 1962(a) and (b), and has further failed to allege with particularity an enterprise prior to ZFC's incorporation, or a pattern of racketeering after incorporation, under § 1962(c). ZFC also argues that the RICO conspiracy claim under § 1962(d) fails because the underlying substantive RICO claims are defective.

NGI stipulates to dismissal without prejudice of the 3rd, 4th, 5th, 19th, 26th and 34th causes of action. NGI argues that it has stated a valid claim for its 6th cause of action, reverse passing off under the Lanham Act, and states it should not be dismissed. NGI also argues that it

has adequately alleged they have suffered and are continuing to suffer a RICO injury and that the 35th cause of action, RICO, should not be dismissed. NGI further argues that the copyright statute does not preempt its claims for the 20th and 21st causes of action – unjust enrichment, the 22nd and 29th causes of action – conversion, the 23rd and 28th causes of action – tortious interference, the 30th and 31st causes of action – unfair competition, and the 32nd and 33rd causes of action – conspiracy. And NGI argues that the Uniform Trade Secrets Act (UTSA) does not preempt its state law claims, including its fraud claim – the 16th cause of action, its 20th and 21st causes of action for unjust enrichment, its claim for conversion – the 22nd and 29th causes of action, and its claims for tortious interference (23rd and 28th), unfair competition (30th and 31st) and conspiracy (32nd and 33rd). Finally, it argues that it has validly alleged the conversion, unjust enrichment, tortious interference and unfair competition claims sufficient to withstand ZFC’s motion to dismiss.

D. Preliminary Injunction

NGI and the other named plaintiffs also seek a preliminary and permanent injunction against ZFC and the named defendants. They request the court enter an order that ZFC and other defendants cease using or disclosing, among other things, any Confidential Information and Proprietary Information, including the Alamo and Deathstar files, NGI’s Surveys Online, eBack and eSummary software, and the Extraordinary Leader guides and workshop materials. They also request the return of all of the property NGI believes is protected. And they require an order against ZFC to cease all of its activities trading on NGI’s goodwill. NGI relies on an argument that the Employment Agreements entitle it to its sought-after relief because of the defendants

breach of their “use and disclosure” covenants. Essentially, NGI argues that defendants’ breach of their Employment Agreements by using and disclosing certain confidential and proprietary information causes irreparable harm and must be enjoined.

ZFC opposes NGI’s preliminary injunction on several grounds. It first argues that NGI’s motion should fail because it has delayed filing this motion for several years. ZFC argues that NGI was aware of the alleged wrongdoing beginning in 2001, and that it launched an investigation into the matter in 2004. ZFC also argues that NGI admits in its complaint that it began to be aware of its potential claims in mid-2004, and that NGI formally notified ZFC in May of 2005 of some of the alleged wrongdoing. Therefore, ZFC argues that NGI has waited too long to bring this motion and that the court should deny the motion because NGI failed to take any appropriate action over the alleged wrongdoing for several years. This argument, if valid, certainly undercuts the extraordinary remedy of the requested injunction.

ZFC also argues that a portion of NGI’s motion is moot and should be denied. ZFC argues that it is not currently using most of the items for which NGI seeks an injunction. It also states that it has surrendered all such materials to its counsel, has not retained any copies of these items, and represents that it will not make any future use. Since it has either abandoned, removed, or given to its counsel much of the information, programs and materials of which NGI complains, ZFC argues that the preliminary injunction motion is moot to these items.

Finally, ZFC argues that a permanent injunction is not appropriate at this juncture because NGI has not shown that it can prevail on the merits. And it further argues that NGI is not entitled to a preliminary injunction because it has not met the close scrutiny standard nor demonstrated

the requisite irreparable harm, success on the merits, that the balances of harms favors NGI, or that the injunction would not be adverse to the public interest. NGI responds to all of these arguments.

DISCUSSION

A. Standard of Review

Dismissal of a complaint is proper only where, after taking all well-pleaded factual allegations as true, “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”²⁵ “Accepting the complaint’s allegations as true, [the court must] consider whether the complaint, standing alone, is legally sufficient to state a claim upon which relief can be granted.”²⁶ “The court must view all reasonable inferences in favor of [NGI], and the pleadings must be liberally construed.”²⁷

B. Motion to Dismiss

NGI stipulates to dismissal of their 3rd, 4th, 5th, 19th, 26th and 34th causes of action without prejudice. ZFC withdraws its motion to dismiss the 14th and 15th causes of action, as well as the dismissal of the common law claim for palming off. Therefore, the court is left to deal with the motion to dismiss the 6th, 16th, 20th, 21st, 22nd, 23rd, 28th, 29th (in part), 30th, 31st, 32nd, 33rd, and 35th causes of action. The parties have helped the court with thorough briefs. The causes of action can be easily summarized as follows:

²⁵ *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

²⁶ *E.F.W. v. St. Stephen’s Indian High School*, 264 F.3d 1297, 1303 (10th Cir. 2001).

²⁷ *Ruiz v. McDonnell*, 299 F.3d 1173, 1181 (10th Cir. 2002) (citations omitted).

Cause of Action Number	Nature of Cause of Action
6th Cause of Action	Lanham Act - Reverse Passing Off (TTCI v. ZFC)
16th Cause of Action	Fraud (NGI v. ZFC)
20th Cause of Action	Unjust Enrichment (NGI v. Mssrs. Zenger, Folkman)
21st Cause of Action	Unjust Enrichment (TTCI v. ZFC)
22nd Cause of Action	Conversion (TTCI v. ZFC, Mssrs. Nicholson, Folkman)
23rd Cause of Action	Tortious Interference with Existing and Prospective Economic Relations (TTCI v. Everyone)
28th Cause of Action	Tortious Interference with Existing and Prospective Economic Relations (NGI v. Everyone)
29th Cause of Action (in part)	Conversion (NGI v. Mr. Folkman)
30th Cause of Action	Unfair Competition (NGI v. Everyone)
31st Cause of Action	Unfair Competition (TTCI v. Everyone)
32nd Cause of Action	Conspiracy (NGI v. Everyone)
33rd Cause of Action	Conspiracy (TTCI and Mr. Galley v. Everyone)
35th Cause of Action	RICO (Everyone v. Mssrs Zenger, Folkman, Sandholtz, Nicholson, Buckner, and Price)

1. 6th Cause of Action – Reverse Passing Off

ZFC argues that NGI’s “reverse passing off” claim under the Lanham Act conflicts with or is preempted by the Copyright Act. This is seemingly an issue of first impression for this district, and the Tenth Circuit has not ruled on any similar case. TTCI specifically alleges that it has a Lanham Act claim against ZFC for holding itself out as “The Training Company” and for later falsely designating TTCI’s Performance Surveys web interface and its database as copyrighted by ZFC. ZFC moves to dismiss this portion of the claim because the Lanham Act

does not recognize claims for “reverse passing off,”²⁸ or in laymen’s terms: falsely claiming authorship or ownership of copyrighted materials. It argues that such rights or claims must be sought through the Copyright Act, rather than the Lanham Act.

The Lanham Act imposes liability “on any person who, on or in connection with any goods or services . . . uses false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion . . . as to the origin . . . of his or her goods [or] services.”²⁹ According to the U.S. Supreme Court’s decision in *Dastar Corp. v. Twentieth Century Fox Film Corporation*,³⁰ there are two basic types of false-designation-of-origin claims. The first is “passing off” or “palming off,” which occurs when a person misrepresents his or her goods and services as someone else’s.³¹ The second is known as “reverse passing off” or “reverse palming off,” which occurs when a person misrepresents someone else’s goods or services as his or her own.³²

NGI’s complaint specifically alleges that ZFC used TTCI’s name and copyright notices, falsely designating itself as the owner without permission. It further alleges that ZFC posted a copyright notice on TTCI’s website falsely claiming the copyright to the site, as well as falsely claiming ownership to TTCI’s website and survey software. The gravamen of TTCI’s claim

²⁸ See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 28 n.1 (2003).

²⁹ 15 U.S.C. § 1125(a)(1)(A).

³⁰ 539 U.S. 23 (2003).

³¹ *Id.* at 28 n.1.

³² *Id.*

appears to be a “false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion . . . as to the origin . . . of his or her goods.”³³

Dastar dealt with uncopyrighted material, whereas this case deals with materials allegedly copyrighted at the time of the instant action. It is fairly clear that a NGI seeks relief by alleging certain copyright claims here as well. But, given that this is a case of first impression in this district, and because the Tenth Circuit has not yet ruled on this type of issue, the court is reluctant to conclude that no set of facts could conceivably be developed that would support such a cause of action. Reserving the right to review this issue again on a motion for summary judgment, the court will DENY the motion to dismiss NGI’s 6th cause of action, the Lanham Act “reverse passing off” claim.

2. 16th Cause of Action - Fraud

ZFC argues that NGI’s fraud claim should be dismissed because the UTSA preempts such a claim. Specifically, NGI claims misrepresentations from ZFC about its use of “surveys, items and norms constituting proprietary information protected by [ZFC’s] contractual obligations to [NGI].”³⁴ NGI states that the complaint alleges Mr. Folkman represented to NGI that ZFC was “not using any surveys or items or norms from” NGI.³⁵ The definition of this proprietary information is either “confidential” or not “confidential,” not in the public domain, not generally

³³ *Id.* at 31.

³⁴ NGI’s Memo. in Opp. to Mot. to Dismiss, at 27.

³⁵ Complaint ¶¶ 208-09.

used by others in competition with NGI, and developed, purchased or acquired for NGI. ZFC argues that NGI has to establish that the information was “in fact confidential” to succeed on its fraud claim. ZFC further argues that misappropriation of confidential information through a breach of confidentiality or fiduciary duty is expressly covered by the UTSA.³⁶ Relying on a Connecticut District Court case and a Illinois District Court case,³⁷ ZFC states unequivocally that “[m]isrepresentations to acquire or cover up the alleged misappropriation of confidential information are preempted by the UTSA.”³⁸

The proprietary information at issue is described as *both* confidential or not, but is undisputably not within the public domain. It is clear that, based on the statements made in the complaint, NGI’s claim does not rely on the confidential nature of the information, especially because the definition of proprietary information described in the Executive Agreements includes both confidential and non-confidential materials. It is unclear why ZFC argues that NGI will have to establish the confidential nature of the information relating to the 16th cause of action, especially because the complaint never states that the surveys, items and norms constituted confidential information. The cases cited by ZFC are inapplicable to dismiss the 16th cause of action, and based on the allegations made on the face of the complaint, the court DENIES ZFC’s motion to dismiss the 16th cause of action.

³⁶ Utah Code Ann. § 13-24-2(1).

³⁷ *On-line Tech., Inc. v. Perkin-Elmer Corp.*, 253 F. Supp. 2d 313, 334 (D. Conn. 2003), *aff’d*, 386 F.3d 1133 (Fed. Cir. 2004); *Thomas & Bett Corp. v. Panduit Corp.*, 108 F. Supp. 2d 968, 974-75 (N.D. Ill. 2000).

³⁸ ZFC’s Reply Memo. in Supp. of Mot. to Dismiss, at 15.

3. 20th and 21st Causes of Action - Unjust Enrichment

ZFC argues that: the Copyright Act preempts claims for unjust enrichment by both NGI and TTCI. It further argues that the UTSA preempts claims for unjust enrichment by NGI and TTCI. And ZFC argues that NGI's and TTCI's unjust enrichment claims against the defendants should be dismissed because both plaintiffs have failed to show that no other remedy at law exists to allow an unjust enrichment claim to proceed.

ZFC first argues that copyright preemption applies to NGI's 20th and 21st causes of action. In the 20th cause of action, NGI alleges that ZFC used confidential client information, including the Alamo and Deathstar data collections, its facilities and resources, and argues that ZFC should pay NGI for these uses. In the 21st cause of action, TTCI claimed ZFC's unjust enrichment through the defendants' continued use of TTCI's Copyrighted Survey Software. ZFC argues that these works are within the subject matter of the Copyright Act and therefore both causes of action should be dismissed. Specifically, ZFC argues that dismissal is warranted by the Tenth Circuit's holding in *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*,³⁹ which held that a claim for the use of proprietary data and engineering formulas is preempted by Copyright Act claims. Additionally, ZFC argues that the Tenth Circuit's decision in *Ehat v. Tanner*⁴⁰ conclusively demonstrates that unjust enrichment claims under Utah law are equivalent to copyright infringement, and therefore preempted by the Copyright Act to the extent they pertain to copyrighted subject matter.

³⁹ 9 F.3d 823, 847 (10th Cir. 1993).

⁴⁰ 780 F.2d 876, 878 (10th Cir. 1985).

ZFC's argument fails, however, on close examination of *Ehat*. It clearly states that "a state common law or statutory claim is preempted if: (1) the work is within the scope of the 'subject matter of copyright' as specified in 17 U.S.C. §§ 102, 103, and (2) the rights granted under state law are equivalent to any exclusive rights within the scope of federal copyright as set out in 17 U.S.C. § 106."⁴¹ At this point in the litigation, ZFC has not indisputably demonstrated that the rights granted under state common law are equivalent to any exclusive rights within the scope of federal copyright. NGI itself argues, and the court agrees, that a motion to dismiss should only be granted when it is clear the plaintiffs cannot prevail on their claims. ZFC provides nothing further than its own statement that these complaints deal with copyrighted works, and therefore must be preempted by the Copyright Act. At this point in the litigation, ZFC's argument is unpersuasive.

ZFC also argues that the UTSA preempts the unjust enrichment causes of action. Because ZFC states that NGI's complaint deals with confidential information, it argues that a majority of the material discussed in the complaint is subject to NGI's trade secret misappropriation claims, except to the extent those claims are based on misappropriation of non-confidential resources and facilities. It is unclear, at least at this point in the litigation, whether the confidential information would necessarily be a trade secret or not, and the court believes that a motion to dismiss on this issue without further discovery is inappropriate.

Regarding the availability of other legal remedies, ZFC relies on *Lysenko v. Sawaya*,⁴² to

⁴¹ *Id.* (emphasis added).

⁴² 973 P.2d 445 (Utah Ct. App. 1999), *aff'd*, 7 P.3d 783 (Utah 2000).

argue that the plaintiffs' unjust enrichment claims are duplicative of a number of its other legal claims ZFC has not moved to dismiss, including breach of contract, copyright, and trade secrets claims. ZFC also points to NGI's 24th cause of action, a breach of contract claim, which alleges the breach of the same contractual obligations as noted in the 20th cause of action. The 20th cause of action alleges that Mssrs. Zenger and Folkman used certain confidential data, NGI's facilities, and its resources to produce *The Extraordinary Leader*, and that such use without payment to NGI is inequitable. The 24th cause of action alleges that Mssrs. Zenger, Folkman and Sandholtz entered into the Executive Agreements and acknowledged NGI's sole and exclusive ownership of confidential and proprietary data. That cause of action further states that the defendants breached these Executive Agreements by competing with NGI, soliciting NGI's customers, and using and disclosing NGI's confidential information. One claim (the 24th) appears to encompass a great deal more than the other claim (the 20th), but they certainly appear to cover similar issues. Indeed, proving the 20th cause of action would bolster NGI's case for the 24th cause of action, but the reverse would not be true.

Again, the court is uncomfortable dismissing this claim without further development of the facts. Because ZFC has not demonstrated that the allegations made on the face of the complaint are insufficient to state a valid claim, the court DENIES ZFC's motion to dismiss the 20th and 21st causes of action. The court can revisit this is on summary judgment with a fuller record before it.

4. 22nd and 29th Causes of Action - Conversion

NGI's 22nd cause of action complains that ZFC willfully deprived TICI of the use and

possession of the passwords and authorization codes to TTCI's websites and converted the registration of those websites to ZFC's ultimate ownership. The complaint also alleges that ZFC deprived TTCI of the use and possession of TTCI's Copyrighted Survey Software. TTCI requests an order transferring these authorization codes, passwords and domain names back to TTCI, and an order requiring ZFC to remove TTCI's Copyrighted Survey Software from all its computers and media. NGI's 29th cause of action further complains that ZFC converted two computer laptops, and that those laptops contained certain proprietary and confidential information. ZFC does not seek dismissal of the conversion claim against the physical taking of the laptop computers.

Again, for reasons similar to those stated above, ZFC argues that conversion claims against the defendants are preempted by the Copyright Act and the UTSA. ZFC further argues that Utah law does not recognize conversion of intangible property. For the reasons stated in the previous discussion, the court does not accept the Copyright Act or the UTSA preemption arguments, at least at this time. ZFC has not demonstrated to the court that, construing the allegations in favor of the plaintiff, that the rights granted under state law (conversion) are necessarily equivalent to any exclusive rights within the scope of the Copyright Act.⁴³

Additionally, ZFC has not adequately demonstrated to the court that the UTSA preempts the conversion claim given that discovery has not actually occurred. And because Utah law has not yet held that domain names or computer software do not constitute property rights, the court is wary of dismissing these conversion claims simply because some other state courts, outside of

⁴³ *Ehat*, 780 F.2d at 878.

this state, have held that domain names and computer software are intangible property rights and not subject to conversion claims. Therefore, ZFC's motion to dismiss the 22nd and 29th (in part) causes of action is DENIED.

5. The 23rd and 28th Causes of Action – Tortious Interference with Existing and Prospective Economic Relations

ZFC argues that the defendants' 23rd and 28th causes of action should be dismissed because they are preempted by the Copyright Act and the UTSA. Additionally, ZFC argues that NGI's allegations of "improper purpose" are defective. ZFC provides district court cases from outside the Tenth Circuit to show that courts addressing the issue of Copyright Act preemption of claims for tortious interference with prospective economic relations generally favor preemption. It is clear, however, that this is a state law claim, and neither Utah state courts nor the Tenth Circuit has discussed this issue. Since ZFC relies on its previous arguments regarding UTSA preemption, the court also finds those unpersuasive to dismiss this claim at this point in the litigation. Furthermore, the court finds unpersuasive ZFC's arguments that NGI's tortious interference pleadings are necessarily defective under Utah law. The court therefore DENIES ZFC's motion to dismiss the 23rd and the 28th causes of action.

6. The 30th and 31st Causes of Action - Unfair Competition

ZFC argues that NGI's 30th and 31st causes of action for unfair competition are preempted by both the Copyright Act and the UTSA. ZFC further argues that NGI has failed to state a claim for relief for unfair competition under Utah law. Again, at this stage of the litigation, the court cannot find that the Copyright Act or the UTSA necessarily preempts all of NGI's unfair competition claims. Therefore, the court DENIES ZFC's motion to dismiss the

unfair competition claims.

7. The 32nd and 33rd Causes of Action - Conspiracy

ZFC argues that NGI's conspiracy claims have not been plead with particularity. NGI complains in both causes of action that "Defendants conspired together to defraud [plaintiffs] to enrich themselves to the detriment of [plaintiffs] by engaging in all of the claimed illegal actions described above."⁴⁴ ZFC cites the Utah Court of Appeals' ruling in *Coroles v. Sabey*,⁴⁵ to argue that a conspiracy to defraud, as the plaintiffs allege here, must be pleaded with particularity. *Coroles* relied on the ineffective pleading of the primary fraud claims to dismiss the secondary fraud and conspiracy claims.⁴⁶ The *Coroles* court also noted that the civil conspiracy section of the plaintiff's complaint did not rely on any of the primary fraud claims as the underlying tort,⁴⁷ while in this case, NGI relies on the underlying torts it alleges as the basis for its conspiracy complaint. *Coroles* did not hold that civil conspiracy claims are subject to the particularity requirements of Ut. R. Civ. P. 9(b), but only stated that Rule 9(b) might "possibly" not apply to civil conspiracy claims using underlying nonfraud torts. At this stage in the pleadings, NGI has clearly alleged a great deal with particularity, and its complaint passes muster on the standards applicable to a motion to dismiss. Therefore, given that the conspiracy claims rely on the underlying claims already addressed, the court declines to dismiss the conspiracy claims both to

⁴⁴ Complaint, at 66.

⁴⁵ 79 P.3d 974, 985 (Ut. Ct. App. 2003).

⁴⁶ *Id.* at 983-85.

⁴⁷ *Id.* at 984.

the extent that they are based on other preempted claims or to the extent that the conspiracy claims have not been pleaded with particularity. And a perusal of the complaint clearly demonstrates that, at least at this stage of the pleadings, NGI has pleaded with great particularity its underlying tort claims. Therefore, the court DENIES ZFC's motion to dismiss the conspiracy claims.

8. 35th Cause of Action - RICO

ZFC argues that NGI's RICO claims should be dismissed for various technical and substantive defects. Specifically, ZFC argues that NGI's 18 U.S.C. § 1962(a) claim is defective for failure to allege an investment injury. And it further argues that NGI's 18 U.S.C. § 1962(b) claim is defective for failure to allege an acquisition or control injury. It appears that the Tenth Circuit has not yet squarely held on either of these issues. Indeed, NGI concedes that the Tenth Circuit has not addressed what specifically would constitute an investment injury, and ZFC concedes that the Tenth Circuit has not yet ruled whether a plaintiff must allege an acquisition injury to assert a claim under § 1962(b). NGI also concedes, however, that other circuits and courts have rejected some of the types of RICO claims it has alleged in its complaint.

Such a determination on whether to dismiss these RICO claims, however, appears more appropriate at a summary judgment motion stage with a fuller factual record rather than at the motion to dismiss stage. Although ZFC's argument may ultimately have merit when the facts are developed, the court cannot conclude that it is impossible for NGI to develop facts properly supporting its allegations. The concept of "investment injury" is a broad one that should be considered against a specific record. The court thus DENIES ZFC's motion to dismiss the 35th

cause of action, RICO.

The court's result:

Cause of Action Number	Nature of Cause of Action	Result
6th Cause of Action	Lanham Act - Reverse Passing Off	DENY
16th Cause of Action	Fraud	DENY
20th Cause of Action	Unjust Enrichment	DENY
21st Cause of Action	Unjust Enrichment	DENY
22nd Cause of Action	Conversion	DENY
23rd Cause of Action	Tortious Interference with Existing and Prospective Economic Relations	DENY
28th Cause of Action	Tortious Interference with Existing and Prospective Economic Relations	DENY
29th Cause of Action (in part)	Conversion	DENY
30th Cause of Action	Unfair Competition	DENY
31st Cause of Action	Unfair Competition	DENY
32nd Cause of Action	Conspiracy	DENY
33rd Cause of Action	Conspiracy	DENY
35th Cause of Action	RICO	DENY

The court GRANTS ZFC's motion to dismiss the 3rd, 4th, 5th, 19th, 26th and 34th causes of action without prejudice. The court DENIES ZFC's motion to dismiss the 6th, 16th, 20th, 21st, 22nd, 23rd, 28th, 29th, 30th, 31st, 32nd, 33rd, and 35th causes of action. The court is confident that the parties will be able to conduct quick and efficient discovery, and will provide

the court with further motions for summary judgment once the facts are more lucid to the parties. And the court is confident that, as discovery proceeds, NGI will also act to dismiss the claims that it finds lack a proper legal basis, as it has already conceded to dismiss certain claims.

C. Preliminary and Permanent Injunction

The court now turns to NGI's motion for preliminary and permanent injunctive relief [#13, #13]. Defendant ZFC argues that it has ceased using or disclosing any of the protected or confidential information. It states unequivocally that to the extent it or its employees used any of the information or computer programs in question, they have stopped using these items and will not use any in the future.⁴⁸ Such a statement and certification would generally render a pending injunction motion moot. NGI complains, however, that ZFC is still using NGI's programs, material and information, and that the defendants still advertise their abilities "to show results compared to the results from the best leaders" on their website.⁴⁹ Therefore, NGI argues that documentary evidence created by ZFC itself establishes that it is still currently using NGI's protected property and an injunction is appropriate.

A motion for preliminary injunction may be rendered moot where the complained of activity has ceased and is not likely to reoccur. "A request for injunctive relief remains live only so long as there is some present harm left to enjoin. Once the movant is no longer in harm's way, a motion for an injunction becomes moot."⁵⁰ An issue of fact exists as to whether this injunction

⁴⁸ ZFC's Memo. in Opp. to Mot. for Prelim. Inj., Docket No.38, at ¶¶ 59-62 (June 17, 2006).

⁴⁹ NGI's Memo. in Reply to Mot. for Prelim. Inj., Docket No. 58, at 19 (June 30, 2006).

⁵⁰ *Taylor v. Resolution Trust Corp.*, 56 F.3d 1497, 1502 (D.C.Cir. 1995).

is rendered moot by ZFC's proffered actions and its representations that it has ceased using NGI's protected materials. The representations made by both parties on this issue continues to be a disputed issue, making it difficult for the court to make an actual ruling on this issue based solely on the statements made by the parties. Therefore, the court looks to the further merits of NGI's claims for injunctive relief.

The Tenth Circuit recently emphasized that three types of preliminary injunctions are "specifically disfavored" and, as such, "must be more closely scrutinized to assure that the exigencies of the case supporting the granting of a remedy that is extraordinary even in the normal course."⁵¹ The injunctions requested here do not meet any of the types of "specifically disfavored" preliminary injunctions discussed by the Tenth Circuit,⁵² so the court will apply its normal scrutiny to these motions.

"As a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal."⁵³ Additionally, "courts should be hesitant to grant the extraordinary interim relief of a preliminary injunction in any particular case"⁵⁴

A party seeking a preliminary injunction under Fed. R. Civ. P. Rule 65 must prove that: (1) [he or she] will suffer irreparable injury unless the injunction issues; (2) the threatened

⁵¹ *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc) (*O Centro Espirita*).

⁵² *See id.* at 977 ("(1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits.").

⁵³ *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005) (quoting *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1098 (10th Cir. 1991)).

⁵⁴ *O Centro Espirita*, 389 F.3d at 977.

injury . . . outweighs whatever damages the proposed injunction may cause the opposing party; (3) the injunction, if issued, would not be adverse to the public interest; and (4) there is a substantial likelihood of success on the merits.⁵⁵

After reviewing the voluminous evidence submitted in this case, the court holds that a preliminary injunction is inappropriate here. As discussed in greater detail below, NGI's evidence does not demonstrate that it would suffer irreparable injury if the injunction does not issue, nor does the evidence show a *substantial* likelihood of success on the merits.

1. Irreparable Injury

“Because a showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction, the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered.”⁵⁶ Irreparable injury “does not readily lend itself to definition, nor is it an easy burden to fulfill.”⁵⁷ The Tenth Circuit makes clear, however, “that the injury ‘must be both certain and great, and that it must not be merely serious or substantial.’”⁵⁸ The Tenth Circuit has clearly stated that irreparable harm exists only when “the injury cannot be adequately atoned for in money . . . or when the district court cannot remedy [the injury] following a final

⁵⁵ *Id.* (citations omitted).

⁵⁶ *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004) (internal quotations and citations omitted).

⁵⁷ *Id.* at 1262 (internal quotations and citations omitted).

⁵⁸ *Id.* (quoting *Prairie Band of Potawotomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001)).

determination on the merits.”⁵⁹

NGI first argues that a number of former NGI employees stipulated in their hiring agreements that any breach by them would be an irreparable injury. The fact that certain defendants have stipulated to such injury is a factor, but not dispositive; the court must still conduct its own inquiry into the matter.

In general, NGI asserts that it will suffer irreparable harm, alleging that ZFC has used and continue to use NGI’s protected property. NGI argues that ZFC’s use of its protected property results in the presumption of irreparable harm, especially given the statements made in the Executive Agreements by the defendants. It further argues that ZFC’s breach has resulted in harm to goodwill, which is a remedy difficult to calculate by money damages. It also argues that ZFC’s use of the protected property results in a reduced value of that property for NGI, and also corresponds to a loss of competitive position in the marketplace for NGI. And finally, it argues that ZFC’s use of the protected property results in lost opportunities for NGI.

First, it is clear that most, if not all, of the alleged damages can be compensated through monetary damages. NGI alleges that ZFC has taken its property and used it in its own business. If the allegations are proven at trial, NGI’s damages would be somewhere in the vicinity of the lost profits, or ZFC’s profits (if *all* of ZFC’s profits were related to the protected property, something the court highly doubts). And experts can readily provide reasonable estimates of the damage to NGI’s business in monetary terms over the appropriate time period.

Further, NGI has not sufficiently demonstrated that it will suffer a substantial business

⁵⁹ *Prairie Band of Potawatomi Indians*, 253 F.3d at 1250.

disruption that will cause its reputation and goodwill to suffer. In *Dominion Video Satellite, Inc. v. EchoStar Satellite Corporation*,⁶⁰ the Tenth Circuit affirmed a district court's finding that the movant for a preliminary injunction would be irreparably harmed because of proof offered by a satellite service distributor. Specifically, the distributor demonstrated that its business had previously suffered from the satellite service provider's refusal to activate their subscribers' satellite services, that a number of subscribers presently awaiting activation had already cancelled their subscription as a result, and that the satellite provider relied heavily on word-of-mouth business. Furthermore, in that case the satellite distributor could not personally activate the subscriber's satellite systems.

In contrast, NGI has not demonstrated to this court that it has clearly lost business, nor that it relied heavily on word-of-mouth to obtain its business. Furthermore, it has not demonstrated that it could not personally provide its services to other customers because of ZFC's actions. To the contrary, it appears NGI continues to provide its services to its customers without any hindrance by ZFC. Unlike the satellite distributor in *Dominion I*, NGI has failed to establish a threat to its reputation, goodwill, or the continuous flow of its business that could not be atoned for by money. Consequently, NGI has not demonstrated that it will suffer irreparable harm if this court does not issue an injunction.

Additionally, the court is wary of issuing an injunction given that time does not appear of the essence to NGI. NGI certainly complains that it is continuously being harmed and needs a timely resolution, but its actions before filing this complaint (and after) do not demonstrate a

⁶⁰ 269 F.3d 1149 (10th Cir. 2001).

clear desire for immediate action. NGI's complaint raises numerous assertions regarding dates as early as 2001, and certainly discusses actions occurring in 2004 and 2005. To come to the court in mid-2006 seeking a preliminary and permanent injunction against ZFC for activities that allegedly began at least in 2004, and possibly as early as 2001, does not demonstrate a need for rapidity. And when the court further requested an expedited time schedule to permit a trial to remedy NGI's alleged harms, it appears that NGI is the party that actually requested an extended scheduling order. Such actions by NGI do not demonstrate to the court NGI's true concerns that it needs expedited relief to remedy any alleged harms. All of these factors do not fall in favor of NGI's motion for preliminary and permanent injunctive relief, and on these grounds alone the court DENIES NGI's motion for a preliminary and permanent injunction [#13, #13]

2. Success on the Merits

NGI must also show success on the merits to warrant a preliminary and permanent injunction. In this case, although NGI has demonstrated considerable aptitude in providing mountains of documentation and evidence against ZFC, ZFC has also provided a number of documents and statements that give the court pause. Although the Executive Agreements signed by the ZFC defendants do provide certain evidence of a breach, ZFC's has also provided rebuttal evidence that effectively counters NGI's proffered evidence. And NGI provides certain statements or actions made by the ZFC defendants, but the ZFC defendants also provide effective counter-evidence that does not conclusively allow the court to decide in favor of NGI or ZFC.

Given all of these statements and documents provided, the court is unsure whether NGI has shown sufficient success on the merits to prevail on an injunction against ZFC. Of course,

the court does not comment on the ultimate merits of this case at this early juncture. But to justify the extraordinary relief of a preliminary or permanent injunction, NGI must demonstrate a stronger case than it has so far. The documents and statements provided by ZFC put this case into essentially a “he said- she said” realm, which is not the kind of stuff from which a preliminary injunction can be manufactured. Accordingly, the court finds that NGI has failed to meet its high burden of demonstrating success on the merits of its claim to warrant its requested injunctive relief.

Because the court finds that NGI has not demonstrated irreparable harm, nor a substantial likelihood of success on the merits, the court declines to consider the other factors needed for a successful motion for injunctive relief. Based on the discussion above, the court DENIES NGI’s motion for a preliminary and permanent injunction without prejudice [#13, #13]. NGI may refile its motion for a permanent injunction at the appropriate time.

CONCLUSION

The court GRANTS IN PART and DENIES IN PART ZFC's motion to dismiss [#31]. Based on the parties' stipulations, the court DISMISSES the 3rd, 4th, 5th, 19th, 26th and 34th causes of action without prejudice. The court DENIES ZFC's motion to dismiss the 6th, 16th, 20th, 21st, 22nd, 23rd, 28th, 29th, 30th, 31st, 32nd, 33rd, and 35th causes of action. The court also DENIES NGI's motion for preliminary [#13] and permanent injunction [#13] based on the reasoning stated above. Now that a scheduling order has been filed with the court on August 11, 2006, the court looks forward to a swift resolution of this case according to that scheduling order.

SO ORDERED.

DATED this 8th day of September, 2006.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Paul Cassell", is written over a horizontal line.

Paul G. Cassell
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH,

CENTRAL DIVISION

FILED
U.S. DISTRICT COURT

2006 SEP -1 P 3:55

DISTRICT OF UTAH

BY: ~~DEPUTY CLERK~~

JOHN A. CAMPBELL,
Plaintiff,

v.

MUNICIPALITY OF HACKENSAK, NEW
JERSEY,
Defendant.

Case No. 2:06-CV-713-DB

ORDER

Before the Court is a Complaint filed by pro se Plaintiff, John A. Campbell. Plaintiff's Complaint was filed on August 25, 2006 (Document #3), the same day Plaintiff's motion to proceed in *forma pauperis* was granted (Documents #1, 2), and the same day Plaintiff also filed motions requesting service of process (Document #4) and appointment of counsel (Document #5). United States District Judge Dee Benson, to whom the case was assigned, referred the case to United States Magistrate Judge Samuel Alba on August 28, 2006, pursuant to 28 U.S.C. § 636(b)(1)(B). (Document #7.)

Plaintiff is proceeding pro se. As a result, the Court construes his pleadings liberally and holds his pleadings to a

less stringent standard than formal pleadings drafted by lawyers. See *Riddle v. Mondragon*, 83 F.3d 1197, 1202 (10th Cir. 1996). However, a broad reading of his complaint does not relieve Plaintiff of the burden of alleging sufficient facts on which a recognized legal claim can be based. See *id.*

Not every fact must be described in specific detail, and the plaintiff whose factual allegations are close to stating a claim but are missing some important element that may not have occurred to him, should be allowed to amend his complaint. Nevertheless, conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based. This is so because a pro se plaintiff requires no special legal training to recount the facts surrounding his alleged injury, and he must provide such facts if the court is to determine whether he makes out a claim on which relief can be granted. Moreover, in analyzing the sufficiency of the plaintiff's complaint, the court need accept as true only the plaintiff's well-pleaded factual contentions, not his conclusory allegations.

Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991) (citations omitted). The Court notes that it is not its proper function to assume the role of advocate for Plaintiff or any other pro se litigant. See *id.* The Court "will not supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on a plaintiff's behalf." *Whitney v. New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir. 1997).

In addition, at 28 U.S.C. § 1915(e)(2)(B), the law directs that "the court shall dismiss the case at any time if the court determines that - . . . (B) the action or appeal - (i) is

frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." Because Plaintiff is proceeding *in forma pauperis*, the Court must consider whether Plaintiff's Complaint falls within the directive of Section 1915(e)(2)(B).

Section 1915(e)(2)(B) is an issue in this case because it appears that Plaintiff has not yet stated a claim upon which relief may be granted. Plaintiff appears to be complaining about two tickets he received for not riding a bicycle properly. He explains that the first ticket was for riding a bicycle in the middle of the road and the second ticket was for not staying to the right of the road. Plaintiff complains, "They keep giving me these type of problems. Both are not true, false tickets." Plaintiff states that following the second ticket, he was jailed for six days and fined \$50.00.

Plaintiff appears to be appealing from the issuance of these two tickets. He appears to be alleging that he was improperly ticketed both times. However, the Court is unable to discern what federal claim can be made from such an appeal of two tickets. Plaintiff has not alleged that the tickets were given for federal offenses, nor has Plaintiff alleged that federal laws or constitutional rights were violated in the issuance of the tickets.

Because Plaintiff is proceeding *pro se*, the Court wishes to provide him with an opportunity to amend his complaint before the Court issues its Report and Recommendation to Judge Benson. As a result, **IT IS HEREBY ORDERED** that within thirty (30) days of the date of this order, Plaintiff provide the Court with an Amended Complaint setting forth with sufficient specificity Plaintiff's federal claim and the supporting facts.

DATED this 5th day of September, 2006.

BY THE COURT:

A handwritten signature in cursive script, appearing to read 'S. Alba', is written over a horizontal line.

SAMUEL ALBA
United States Chief Magistrate Judge

UNITED STATES DISTRICT COURT

FILED
U.S. DISTRICT COURT

Central

District of

2006 SEP -7 P 4: 00

John A. Campbell

Plaintiff

V.

City of Hackensack, NJ

Defendant

ORDER ON APPLICATION
TO PROCEED WITHOUT
PREPAYMENT OF FEES

U.S. DISTRICT COURT

C Judge Dee Benson
DECK TYPE: Civil
DATE STAMP: 09/07/2006 @ 16:22:55
CASE NUMBER: 2:06CV00753 DB

Having considered the application to proceed without prepayment of fees under 28 USC §1915;

IT IS ORDERED that the application is:


☒ GRANTED.

☐ The clerk is directed to file the complaint.

☐ IT IS FURTHER ORDERED that the clerk issue summons and the United States marshal serve a copy of the complaint, summons and this order upon the defendant(s) as directed by the plaintiff. All costs of service shall be advanced by the United States.

☐ DENIED, for the following reasons:

ENTER this 6th day of Sept, 2006.


Signature of Judge

Magistrate Judge Paul M. Warner
Name and Title of Judge

UNITED STATES DISTRICT COURT

Central Division

District of

FILED
U.S. DISTRICT COURT
UTAH

2006 SEP -7 P 3: 56

John A. Campbell

Plaintiff

V.

Ramapo Collision

Defendant

**ORDER ON APPLICATION
TO PROCEED WITHOUT
PREPAYMENT OF FEES**

Judge Dee Benson

DECK TYPE: Civil

DATE STAMP: 09/07/2006 @ 16:24:59

CASE NUMBER: 2:06CV00754 DB

Having considered the application to proceed without prepayment of fees under 28 USC §1915;

IT IS ORDERED that the application is:

☒ GRANTED.

☐ The clerk is directed to file the complaint.

☐ IT IS FURTHER ORDERED that the clerk issue summons and the United States marshal serve a copy of the complaint, summons and this order upon the defendant(s) as directed by the plaintiff. All costs of service shall be advanced by the United States.

☐ DENIED, for the following reasons:

ENTER this 7th day of September, 2006.



Signature of Judge

Magistrate Judge Paul M. Warner

Name and Title of Judge

UNITED STATES DISTRICT COURT

FILED
U.S. DISTRICT COURT

2006 SEP -7 P 3: 55

Central Division

District of

UTAH

CLERK OF DISTRICT COURT OF UTAH

John A. Campbell

Plaintiff

V.

S.S. Administration et al

Defendant

ORDER ON APPLICATION
TO PROCEED WITHOUT
PREPAYMENT OF FEES

DEPUTY CLERK

Judge J. Thomas Greene

DECK TYPE: Civil

DATE STAMP: 09/07/2006 @ 16:27:37

CASE NUMBER: 2:06CV00755 JTG

Having considered the application to proceed without prepayment of fees under 28 USC §1915;

IT IS ORDERED that the application is:


☒ GRANTED.

☐ The clerk is directed to file the complaint.

☐ IT IS FURTHER ORDERED that the clerk issue summons and the United States marshal serve a copy of the complaint, summons and this order upon the defendant(s) as directed by the plaintiff. All costs of service shall be advanced by the United States.

☐ DENIED, for the following reasons:

ENTER this 7th day of September, 2006.


Signature of Judge

Magistrate Judge Paul M. Warner
Name and Title of Judge

United States District Court

Central Division for the District of Utah

FILED
DISTRICT COURT
2006 SEP -7 P 3:59

DIANE M. FRITZ

v.

DEA et al.

ORDER ON APPLICATION TO PROCEED WITHOUT PREPAYMENT OF FEES

Judge Dale A. Kimball
DECK TYPE: Civil
DATE STAMP: 09/07/2006 @ 16:42:59
CASE NUMBER: 2:06CV00756 DAK

Having considered the application to proceed without prepayment of fees under 28 U.S.C. 1915;


IT IS ORDERED that the application is:

☒ GRANTED.

☐ The clerk is directed to file the complaint.

☐ DENIED, for the following reasons:

ENTER this 6th day of September, 2006.


Signature of Judicial Officer

Paul M. Warner
U.S. Magistrate Judge
Name and Title of Judicial Officer

UNITED STATES DISTRICT COURT

FILED
U.S. DISTRICT COURT

Central

District of

2007 SEP -8 P 1:04

John A. Campbell

Plaintiff

V.

Social Security Administration

Defendant

**ORDER ON APPLICATION
TO PROCEED WITHOUT
PREPAYMENT OF FEES**

Judge J. Thomas Greene

DECK TYPE: Civil

DATE STAMP: 09/08/2006 @ 13:12:12

CASE NUMBER: 2:06CV00758 JTG

Having considered the application to proceed without prepayment of fees under 28 USC §1915;

IT IS ORDERED that the application is:

☒ GRANTED.

☐ The clerk is directed to file the complaint.

☐ IT IS FURTHER ORDERED that the clerk issue summons and the United States marshal serve a copy of the complaint, summons and this order upon the defendant(s) as directed by the plaintiff. All costs of service shall be advanced by the United States.

☐ DENIED, for the following reasons:

ENTER this 8th day of September, 2006.



Signature of Judge

Magistrate Judge Paul M. Warner

Name and Title of Judge

UNITED STATES DISTRICT COURT

FILED
DISTRICT COURT

Central Division

District of

703 DTAH-8 P 1:03

John A. Campbell

Plaintiff

V.

S.S. Administration

Defendant

ORDER ON APPLICATION
TO PROCEED WITHOUT
PREPAYMENT OF FEES

Judge Bruce S. Jenkins

DECK TYPE: Civil

DATE STAMP: 09/08/2006 @ 13:12:51

CASE NUMBER: 2:06CV00759 BSJ

Having considered the application to proceed without prepayment of fees under 28 USC §1915;

IT IS ORDERED that the application is:

☒ GRANTED.

☐ The clerk is directed to file the complaint.

☐ IT IS FURTHER ORDERED that the clerk issue summons and the United States marshal serve a copy of the complaint, summons and this order upon the defendant(s) as directed by the plaintiff. All costs of service shall be advanced by the United States.

☐ DENIED, for the following reasons:

ENTER this

8th

day of

September

, 2006.

Signature of Judge

Magistrate Judge Paul M. Warner

Name and Title of Judge